

B 2
STORAGE



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114680226>

CA20N
LR
-054

ONTARIO LABOUR RELATIONS BOARD REPORTS

January 1995



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	J. McCORMACK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	C. ALBERTYN
	M. BENDEL
	J.B. BLOCH
	P. CHAPMAN
	L. DAVIE
	N.V. DISSANAYAKE
	D. GEE
	R.G. GOODFELLOW
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	M. KAYE JOACHIM
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	J. KOVACS
	S. LIANG
	G. MISRA
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	L. SHOULDICE
	I.M. STAMP
	R. STOYKEWYCH
	G. SURDYKOWSKI
	L. TRACHUK

Members

B.L. ARMSTRONG	J.W. MURRAY
W.A. CORRELL	D.A. PATTERSON
K.S. DAVIES	H. PEACOCK
A.R. FOUCAULT	R.W. PIRRIE
W.N. FRASER	F.B. REAUME
P.V. GRASSO	J. REDSHAW
V. HARRIS	J.A. RONSON
A. HERSHKOVITZ	J.A. RUNDLE
J. IRVINE	D. RYAN
J. KENNEDY	P. SEVILLE
S. LAING	R.M. SLOAN
J. LEAR	M. SULLIVAN
D.A. MacDONALD	J. TRIM
C. McDONALD	M. VUKOBRAT
O. McGUIRE	R. WEISS
G. McMENEMY	W.H. WIGHTMAN
R.R. MONTAGUE	D.G. WOZNIAK

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K. HESKA
	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1995] OLRB REP. JANUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1. A-1 Rent-A-Tool Ontario Ltd.; Re USWA; Re Group of Employees	1
2. Board of Governors of Algoma University College; Re Algoma University College Staff Association and Algoma University College Faculty Association.....	9
3. Désourdy 1949 Paving Inc.; Re LIUNA, Local 527	12
4. DuraSystems Barriers Inc., Duffy Mechanical Contractors Limited; Re Sheet Metal Workers' International Association, Local 30	14
5. Ellis-Don Construction Ltd. and J.P. Matte Peintures Ltee, LIUNA Local 247 and; Re Pat and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 114.....	20
6. William Hill Jr.; Re International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938	21
7. Kingsbridge Theatre on The Square (Niagara) Inc., Cineplex Odeon Corporation and/or 796278 Ontario Limited and/or; Re IATSE, Local 461	32
8. Nelson Quarry Company; Re USWA.....	35
9. Oryx Fixtures Inc.; USWA	56
10. Reynolds-Lemmerz Industries; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada); Re Group of Employees	59
11. Tembec Forest Products (1990) Inc., IWA-Canada, Local 1-100 and; Re CJA, Local 1030 ..	66
12. The Governing Council of the University of Toronto; Re OPSEU; Re International Union, United Plant Guard Workers of America, Local 1962	71
13. Versa Services Ltd.; Re CAW-Canada; Re Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414; Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees Local Union No. 647.....	79
14. William J. Viveen; Re USWA, Local 7135; Re National Steel Car Limited	85

COURT PROCEEDINGS

1. Ellis-Don Limited; Re OLRB and IBEW, Local 894	92
2. Reynolds-Lemmerz Industries; Re CAW-Canada, OLRB	93

SUBJECT INDEX

- Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal
- ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894 92
- Accreditation - Abandonment - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal
- ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894 92
- Adjournment - Certification - Construction Industry - Practice and Procedure - Board Officer conducting examination into dispute over list and composition of bargaining unit - Counsel seeking adjournment following examination-in-chief of witness on ground that he was taken by surprise by evidence, and asking that Board rule on request - Board explaining importance of Board Officer examination process and observing that Board Officer in best position to rule on requests for adjournments and other procedural matters - Accordingly, as a general proposition, Board will uphold the Officer's procedural directions, absent a compelling reason to do otherwise - Board finding no compelling reason in this case not to confirm Officer's decision directing counsel to commence cross-examination forthwith
- DÉSOURDY 1949 PAVING INC.; RE LIUNA, LOCAL 527 12
- Bargaining Rights - Abandonment - Accreditation - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement

signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894.....

92

Bargaining Unit - Certification - Employees - Practice and Procedure - Whether persons employed in disputed classifications should be included in bargaining unit - Employer failing to comply with Board direction to file particulars of its position including details of job functions and basis for employer's request - Board deciding matter based solely on statement of facts filed by union and on parties' oral argument - Board not satisfied that lead hands, line persons and senior deburrers exercising managerial functions within meaning of Act - Facts not supporting submission that lead hands, line persons and senior deburrers not sharing sufficient community of interest with other members of proposed bargaining unit - Final certificate issuing

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES.....

59

Bargaining Unit - Certification - Employee - Judicial Review - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed

REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB.....

93

Certification - Adjournment - Construction Industry - Practice and Procedure - Board Officer conducting examination into dispute over list and composition of bargaining unit - Counsel seeking adjournment following examination-in-chief of witness on ground that he was taken by surprise by evidence, and asking that Board rule on request - Board explaining importance of Board Officer examination process and observing that Board Officer in best position to rule on requests for adjournments and other procedural matters - Accordingly, as a general proposition, Board will uphold the Officer's procedural directions, absent a compelling reason to do otherwise - Board finding no compelling reason in this case not to confirm Officer's decision directing counsel to commence cross-examination forthwith

DÉSOURDY 1949 PAVING INC.; RE LIUNA, LOCAL 527.....

12

Certification - Bargaining Unit - Employee - Judicial Review - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application -

Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed

REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB 93

Certification - Bargaining Unit - Employees - Practice and Procedure - Whether persons employed in disputed classifications should be included in bargaining unit - Employer failing to comply with Board direction to file particulars of its position including details of job functions and basis for employer's request - Board deciding matter based solely on statement of facts filed by union and on parties' oral argument - Board not satisfied that lead hands, line persons and senior deburrers exercising managerial functions within meaning of Act - Facts not supporting submission that lead hands, line persons and senior deburrers not sharing sufficient community of interest with other members of proposed bargaining unit - Final certificate issuing

REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES 59

Certification - Charges - Intimidation and Coercion - Membership Evidence - Employer alleging that membership evidence collected through threats to employees' job security by former supervisor at workplace - Board not convinced that former supervisor's encouragement of unionization casting doubt on voluntariness of membership evidence submitted - Certificate issuing

VERSA SERVICES LTD.; RE CAW-CANADA; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCAL 414; MILK AND BREAD DRIVERS, DAIRY EMPLOYEES CATERERS AND ALLIED EMPLOYEES LOCAL UNION NO. 647..... 79

Certification - Evidence - Membership Evidence - Petition - Practice and Procedure - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing

A-1 RENT-A-TOOL ONTARIO LTD.; RE USWA; RE GROUP OF EMPLOYEES 1

Certification - Laid-off employee attending course at employer's expense on application date - Board holding that employee should be included on list of employees for purposes of the count - Board directing representation vote

ORYX FIXTURES INC.; USWA 56

Certification - Pre-Hearing Vote - Timeliness - Board concluding that Social Contract Act not rendering raiding union's application for certification untimely - Board directing that ballots cast in representation vote be counted

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE OPSEU; RE INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 1962 71

Charges - Certification - Intimidation and Coercion - Membership Evidence - Employer alleging

that membership evidence collected through threats to employees' job security by former supervisor at workplace - Board not convinced that former supervisor's encouragement of unionization casting doubt on voluntariness of membership evidence submitted - Certificate issuing

VERSA SERVICES LTD.; RE CAW-CANADA; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCAL 414; MILK AND BREAD DRIVERS, DAIRY EMPLOYEES CATERERS AND ALLIED EMPLOYEES LOCAL UNION NO. 647.....

79

Collective Agreement - Abandonment - Accreditation - Bargaining Rights - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894.....

92

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894.....

92

Construction Industry - Adjournment - Certification - Practice and Procedure - Board Officer conducting examination into dispute over list and composition of bargaining unit - Counsel seeking adjournment following examination-in-chief of witness on ground that he was taken by surprise by evidence, and asking that Board rule on request - Board explaining importance of Board Officer examination process and observing that Board Officer in best position to rule on requests for adjournments and other procedural matters - Accordingly, as a general proposition, Board will uphold the Officer's procedural directions, absent a com-

elling reason to do otherwise - Board finding no compelling reason in this case not to confirm Officer's decision directing counsel to commence cross-examination forthwith

DÉSOURDY 1949 PAVING INC.; RE LIUNA, LOCAL 527..... 12

Construction Industry - Construction Industry Grievance - Board finding employees of responding party to be construction employees and holding that, when engaged in fabrication of ductwork destined for ICI job site, their work is covered by ICI agreement

DURASYSTEMS BARRIERS INC., DUFFY MECHANICAL CONTRACTORS LIMITED; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30..... 14

Construction Industry - Jurisdictional Dispute - Painters' union and Labourers' union disputing assignment of work involving removal of lead-contaminated plaster, its bagging, and its further removal from site - Board holding that work should have been assigned to Labourers' union

ELLIS-DON CONSTRUCTION LTD. AND J.P. MATTE PEINTURES LTEE, LIUNA LOCAL 247 AND; RE PAT AND THE ONTARIO COUNCIL OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 114 20

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894 92

Construction Industry Grievance - Construction Industry - Board finding employees of responding party to be construction employees and holding that, when engaged in fabrication of ductwork destined for ICI job site, their work is covered by ICI agreement

DURASYSTEMS BARRIERS INC., DUFFY MECHANICAL CONTRACTORS LIMITED; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30..... 14

Dependent Contractor - Lock-Out - Strike - Strike Replacement Workers - Unfair Labour Practice - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using services of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union's complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties' written submissions regarding appropriate remedy

NELSON QUARRY COMPANY; RE USWA 35

Discharge - Duty of Fair Representation - Health and Safety - Practice and Procedure - Unfair Labour Practice - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of <i>Labour Relations Act</i> - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed	
WILLIAM J. VIVEEN; RE USWA, LOCAL 7135; RE NATIONAL STEEL CAR LIMITED	85
Discharge - Duty of Fair Representation - Unfair Labour Practice - Board finding union's decision not to take applicant's discharge grievance to arbitration arbitrary and in bad faith, contrary to section 69 of the Act - Application granted - Board remitting question of remedy to parties	
WILLIAM HILL JR.; RE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 938	21
Duty of Fair Representation - Discharge - Health and Safety - Practice and Procedure - Unfair Labour Practice - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of <i>Labour Relations Act</i> - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed	
WILLIAM J. VIVEEN; RE USWA, LOCAL 7135; RE NATIONAL STEEL CAR LIMITED	85
Duty of Fair Representation - Discharge - Unfair Labour Practice - Board finding union's decision not to take applicant's discharge grievance to arbitration arbitrary and in bad faith, contrary to section 69 of the Act - Application granted - Board remitting question of remedy to parties	
WILLIAM HILL JR.; RE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 938	21
Employee - Bargaining Unit - Certification - Judicial Review - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of <i>res judicata</i> or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed	
REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB	93
Employees - Bargaining Unit - Certification - Practice and Procedure - Whether persons employed in disputed classifications should be included in bargaining unit - Employer failing to comply with Board direction to file particulars of its position including details of job functions and basis for employer's request - Board deciding matter based solely on statement of facts filed by union and on parties' oral argument - Board not satisfied that lead hands, line persons and senior deburrers exercising managerial functions within meaning of Act - Facts not supporting submission that lead hands, line persons and senior deburrers not sharing sufficient community of interest with other members of proposed bargaining unit - Final certificate issuing	
REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES	59

Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in <i>Nicholls-Radtke</i> case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal	
ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894	92
Evidence - Certification - Membership Evidence - Petition - Practice and Procedure - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing	
A-1 RENT-A-TOOL ONTARIO LTD.; RE USWA; RE GROUP OF EMPLOYEES	1
Health and Safety - Discharge - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of <i>Labour Relations Act</i> - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed	
WILLIAM J. VIVEEN; RE USWA, LOCAL 7135; RE NATIONAL STEEL CAR LIMITED	85
Interim Relief - Jurisdictional Dispute - Remedies - Carpenters' union representing employees at employer's planning mill - IWA representing employees at employer's sawmill - Carpenters' union making jurisdictional dispute complaint in respect of employer's plan to consolidate operations of planning mill and sawmill at location of sawmill - Carpenters' seeking interim order preventing employer from relocating planning mill pending determination of jurisdictional dispute complaint - Interim relief application dismissed	
TEMBEC FOREST PRODUCTS (1990) INC., IWA-CANADA, LOCAL 1-100 AND; RE CJA, LOCAL 1030	66
Intimidation and Coercion - Certification - Charges - Membership Evidence - Employer alleging that membership evidence collected through threats to employees' job security by former supervisor at workplace - Board not convinced that former supervisor's encouragement of	

unionization casting doubt on voluntariness of membership evidence submitted - Certificate issuing

VERSA SERVICES LTD.; RE CAW-CANADA; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCAL 414; MILK AND BREAD DRIVERS, DAIRY EMPLOYEES CATERERS AND ALLIED EMPLOYEES LOCAL UNION NO. 647.....

79

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894.....

92

Judicial Review - Bargaining Unit - Certification - Employee - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed

REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB.....

93

Jurisdictional Dispute - Construction Industry - Painters' union and Labourers' union disputing assignment of work involving removal of lead-contaminated plaster, its bagging, and its further removal from site - Board holding that work should have been assigned to Labourers' union

ELLIS-DON CONSTRUCTION LTD. AND J.P. MATTE PEINTURES LTEE, LIUNA LOCAL 247 AND; RE PAT AND THE ONTARIO COUNCIL OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, LOCAL UNION 114.....

20

Jurisdictional Dispute - Interim Relief - Remedies - Carpenters' union representing employees at employer's planning mill - IWA representing employees at employer's sawmill - Carpenters' union making jurisdictional dispute complaint in respect of employer's plan to consolidate operations of planning mill and sawmill at location of sawmill - Carpenters' seeking interim order preventing employer from relocating planning mill pending determination of jurisdictional dispute complaint - Interim relief application dismissed

TEMBEC FOREST PRODUCTS (1990) INC., IWA-CANADA, LOCAL 1-100 AND; RE CJA, LOCAL 1030.....

66

Jurisdictional Dispute - University's faculty association and staff association disputing assignment of certain library reference desk and library tour work - Board confirming university's assignment of disputed work to members of both faculty association and staff association

BOARD OF GOVERNORS OF ALGOMA UNIVERSITY COLLEGE; RE ALGOMA UNIVERSITY COLLEGE STAFF ASSOCIATION AND ALGOMA UNIVERSITY COLLEGE FACULTY ASSOCIATION.....

9

Lock-Out - Dependent Contractor - Strike - Strike Replacement Workers - Unfair Labour Practice - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using services of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union's complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties' written submissions regarding appropriate remedy

NELSON QUARRY COMPANY; RE USWA

35

Membership Evidence - Certification - Charges - Intimidation and Coercion - Employer alleging that membership evidence collected through threats to employees' job security by former supervisor at workplace - Board not convinced that former supervisor's encouragement of unionization casting doubt on voluntariness of membership evidence submitted - Certificate issuing

VERSA SERVICES LTD.; RE CAW-CANADA; RE RETAIL WHOLESALE CANADA, CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCAL 414; MILK AND BREAD DRIVERS, DAIRY EMPLOYEES CATERERS AND ALLIED EMPLOYEES LOCAL UNION NO. 647.....

79

Membership Evidence - Certification - Evidence - Petition - Practice and Procedure - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing

A-1 RENT-A-TOOL ONTARIO LTD.; RE USWA; RE GROUP OF EMPLOYEES

1

Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of

Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal	
ELLIS-DON LIMITED; RE OLRB AND IBEW, LOCAL 894	92
Petition - Certification - Evidence - Membership Evidence - Practice and Procedure - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing	
A-1 RENT-A-TOOL ONTARIO LTD.; RE USWA; RE GROUP OF EMPLOYEES	1
Practice and Procedure - Adjournment - Certification - Construction Industry - Board Officer conducting examination into dispute over list and composition of bargaining unit - Counsel seeking adjournment following examination-in-chief of witness on ground that he was taken by surprise by evidence, and asking that Board rule on request - Board explaining importance of Board Officer examination process and observing that Board Officer in best position to rule on requests for adjournments and other procedural matters - Accordingly, as a general proposition, Board will uphold the Officer's procedural directions, absent a compelling reason to do otherwise - Board finding no compelling reason in this case not to confirm Officer's decision directing counsel to commence cross-examination forthwith	
DÉSOURDY 1949 PAVING INC.; RE LIUNA, LOCAL 527	12
Practice and Procedure - Bargaining Unit - Certification - Employees - Whether persons employed in disputed classifications should be included in bargaining unit - Employer failing to comply with Board direction to file particulars of its position including details of job functions and basis for employer's request - Board deciding matter based solely on statement of facts filed by union and on parties' oral argument - Board not satisfied that lead hands, line persons and senior deburrers exercising managerial functions within meaning of Act - Facts not supporting submission that lead hands, line persons and senior deburrers not sharing sufficient community of interest with other members of proposed bargaining unit - Final certificate issuing	
REYNOLDS-LEMMERZ INDUSTRIES; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA); RE GROUP OF EMPLOYEES	59
Practice and Procedure - Bargaining Unit - Certification - Employee - Judicial Review - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of <i>res judicata</i> or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed	
REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB	93
Practice and Procedure - Certification - Evidence - Membership Evidence - Petition - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer	

requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing

A-1 RENT-A-TOOL ONTARIO LTD.; RE USWA; RE GROUP OF EMPLOYEES 1

Practice and Procedure - Discharge - Duty of Fair Representation - Health and Safety - Unfair Labour Practice - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of *Labour Relations Act* - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed

WILLIAM J. VIVEEN; RE USWA, LOCAL 7135; RE NATIONAL STEEL CAR LIMITED 85

Pre-Hearing Vote - Certification - Timeliness - Board concluding that Social Contract Act not rendering raiding union's application for certification untimely - Board directing that ballots cast in representation vote be counted

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE OPSEU; RE INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 1962 71

Remedies - Interim Relief - Jurisdictional Dispute - Carpenters' union representing employees at employer's planning mill - IWA representing employees at employer's sawmill - Carpenters' union making jurisdictional dispute complaint in respect of employer's plan to consolidate operations of planning mill and sawmill at location of sawmill - Carpenters' seeking interim order preventing employer from relocating planning mill pending determination of jurisdictional dispute complaint - Interim relief application dismissed

TEMBEC FOREST PRODUCTS (1990) INC., IWA-CANADA, LOCAL 1-100 AND; RE CJA, LOCAL 1030 66

Representation Vote - Bargaining Unit - Certification - Employee - Judicial Review - Practice and Procedure - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed

REYNOLDS-LEMMERZ INDUSTRIES; RE CAW-CANADA, OLRB 93

Sale of a Business - Movie theatre purchased by non-profit group and converted into live theatre - Movie theatres' projectionists represented by IATSE - Live theatre employing no projectionists - Board concluding that vendor and purchaser engaged in different businesses, and that purchaser not acquiring "part of the business" within meaning of section 64 of the Act - IATSE's sale of a business application dismissed

KINGSBRIDGE THEATRE ON THE SQUARE (NIAGARA) INC., CINEPLEX ODEON CORPORATION AND/OR 796278 ONTARIO LIMITED AND/OR; RE IATSE, LOCAL 461 32

Strike - Dependent Contractor - Lock-Out - Strike Replacement Workers - Unfair Labour Practice - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using ser-

vices of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union's complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties' written submissions regarding appropriate remedy	
NELSON QUARRY COMPANY; RE USWA	35
Strike Replacement Workers - Dependent Contractor - Lock-Out - Strike - Unfair Labour Practice - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using services of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union's complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties' written submissions regarding appropriate remedy	
NELSON QUARRY COMPANY; RE USWA	35
Timeliness - Certification - Pre-Hearing Vote - Board concluding that Social Contract Act not rendering raiding union's application for certification untimely - Board directing that ballots cast in representation vote be counted	
THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO; RE OPSEU; RE INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 1962	71
Unfair Labour Practice - Dependent Contractor - Lock-Out - Strike - Strike Replacement Workers - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using services of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union's complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties' written submissions regarding appropriate remedy	
NELSON QUARRY COMPANY; RE USWA	35
Unfair Labour Practice - Discharge - Duty of Fair Representation - Health and Safety - Practice and Procedure - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of <i>Labour Relations Act</i> - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed	
WILLIAM J. VIVEEN; RE USWA, LOCAL 7135; RE NATIONAL STEEL CAR LIMITED	85
Unfair Labour Practice - Discharge - Duty of Fair Representation - Board finding union's decision not to take applicant's discharge grievance to arbitration arbitrary and in bad faith, contrary to section 69 of the Act - Application granted - Board remitting question of remedy to parties	
WILLIAM HILL JR.; RE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 938	21

2424-94-R United Steelworkers of America, Applicant, v. A-1 Rent-A-Tool Ontario Ltd., Responding Party, v. Group of Employees, Objectors

Certification - Evidence - Membership Evidence - Petition - Practice and Procedure - Union filing new certification application on same date as Board decision granting leave to withdraw earlier application - Employer's request that Board exercise its discretion under section 105(3)(c) of the Act to refuse to entertain new certification application denied - Employer requesting that Board disclose whether any membership cards filed with new application signed by persons who had previously signed anti-union petition and submitting that union should be required to establish voluntariness of signatures on such cards - Employer request denied - Board not satisfied that petitions representing voluntary expression of employee wishes - Certificate issuing

BEFORE: *Jerry Kovacs*, Vice-Chair, and Board Members *W. H. Wightman* and *K. Davies*.

APPEARANCES: *Mark Rowlinson*, *Mike Armstrong* and *Randy Ross* for the applicant; *Mike Failes*, *S. Shinoff* and *J. Elias* for the responding party; *M. Croteau* for the objectors.

DECISION OF THE BOARD; January 25, 1995

1. This is an application for certification. The name of the responding party is hereby amended to read: "A-1 Rent-A-Tool Ontario Ltd."

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board finds that:

all employees of A-1 Rent-A-Tool Ontario Ltd. in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period,

constitute a unit of employees appropriate for collective bargaining.

4. Having regard to the list of employees filed by the employer and the agreement of the parties, the Board finds that there were 56 employees in the unit on the certification application date. In support of its application, the applicant requested that the Board transfer membership evidence ("cards") from Board File No. 2102-94-R in respect of 31 employees. That file was a previous certification application by the same applicant as in this matter, filed September 14, 1994 and withdrawn with leave of the Board by decision dated October 6, 1994. The instant application was filed on October 6, 1994 and included further membership evidence in respect of 3 additional employees. The 34 membership cards bear the names of employees in the bargaining unit.

5. By undated facsimile correspondence received by the Board on October 13, 1994, Michael Croteau (representing the group of objecting employees) requested that the Board transfer "statements of desire" or "petitions" from Board File No. 2102-94-R to the instant file. The petitions, in respect of 33 employees, indicate opposition to the certification of the applicant. Those petitions had been filed subsequent to the certification application date in Board File No. 2102-94-R. In accordance with the provisions of subsection 8(4) of the Act, the petitions were untimely and could not be considered in the context of Board File No. 2102-94-R. Prior to the commencement of the hearing in this matter, two other employees also requested that petitions filed in the previous certification application be transferred to the instant file.

6. Although originally forming part of a separate Board file, the petition evidence in respect of these 35 employees was filed before the certification application date in the current matter. In accordance with the provisions of sections 8(4) and 8(7)(b)-(c), the Board found that it should consider this evidence.

7. A number of the employees who signed petitions had previously signed membership cards. If a sufficient number of these relevant petitions were found to be voluntary, they would raise sufficient doubt concerning membership evidence to lead the Board to exercise its discretion to order a representation vote to determine the degree of continued support for the applicant.

8. Before proceeding in its inquiry into the voluntariness of the petitions, the Board entertained preliminary motions by the employer. Relying on the provisions of paragraph 105(3)(c) of the Act, the employer requested that the Board exercise its discretion to refuse to entertain the instant application. In counsel's submission the instant application was filed before the Board issued a final decision in the first certification application. The parties agreed on relevant facts:

- (i) the applicant made written request to withdraw the prior certification application on October 6, 1994;
- (ii) the Board issued a decision dated October 6, 1994 granting leave to withdraw the prior application, and the decision was mailed to the parties by the Board by letter dated October 13, 1994.
- (iii) the certification application date of the instant file is October 6, 1994.

The employer characterized the applicant's filings as an abuse of process. Counsel argued that the result of these overlapping applications was to prevent any window' of time within which employees might file a timely petition.

9. At the hearing the Board ruled that it would not exercise its discretion to refuse to entertain the subsequent application. We do not find that subsection 105(3) applies to this sequence of filings. The provision applies where "a final decision... has not been issued by the Board [in respect of a prior application] at the time a subsequent application" is made. For the purposes of determining the timing of the final decision, the *Act* focuses our attention on the *issuance* of decision rather than on its *release*. In the case before us, the Board issued a decision dated October 6, 1994 that dismissed the first certification application. On the same date - and thus at the same "time" - a subsequent certification application was made. Neither the Act nor the Board's Rules of Procedure suggest that we ought to attempt to distinguish hours within the same date. Indeed, the Board's Rules and the Act have always suggested otherwise (e.g., current Rule 8 governing deemed date of filing for documents received by registered mail; recently repealed subsection 115(2) governing the same; subsection 115(3) governing deemed time of release of decisions, etc.). Accordingly, a final decision on the first application had been issued at the time the subsequent application was made, rendering subsection 105(3) inapplicable.

10. Even if subsection 105(3) were applicable, we would not exercise our discretion to dismiss this subsequent application. As counsel for the employer noted, the Board's practice in applying this provision is set out in *Mor-Alice Construction Limited* [1977] OLRB Rep. Oct. 668 at paragraphs 6-8. In considering exercise of the discretion to dismiss a subsequent application, the Board looks for substantial prejudice to the employer or the employees. In the instant case, the employer suggested that the employees would be deprived of the opportunity to make representations of opposition to the trade union, since the simultaneous withdrawal of the first application and filing

of the second would block timely petitions. This argument is undermined by the existence of the timely petitions presently before the Board. As the applicant noted, the filing of the subsequent application opened the window' to these petitions and the employees have opportunity to make representations of opposition to the trade union. Therefore, we find no substantial prejudice to the employees or the employer.

11. In a separate preliminary motion, the employer requested that the Board disclose whether any of the 3 additional membership cards filed with the current application were signed by persons who had previously signed a petition. In the employer's submission, those circumstances would change the nature of the membership card evidence. Counsel proposed that the cards would represent a "flip-flop" of employee wishes and should be given no more weight than a petition. Counsel suggested that these cards would be akin to reaffirmation evidence and that the applicant union bore an evidentiary onus to establish the voluntariness of the signatures on those cards.

12. The Board ruled orally that it would not disclose whether there were subsequent membership cards that overlapped with prior petitions. Although petitions may reflect on membership evidence, the reverse is not true. Membership cards do not serve the mere purpose of casting doubt on petitions. Rather, they stand as independent evidence of employee wishes and are accorded a higher status under the *Act*. As the Board observed in *Custom Foam Specialties Limited* [1986] OLRB Rep. Dec. 1680 at parag. 8:

• • •

8. ...The *Labour Relations Act* provides that the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of an application. The Board does not inquire into opinions about the virtues of union membership except as evidenced by that documentary membership evidence and any timely petitions filed with respect to an application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of bargaining unit employees in cases where either the applicant union does not have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under section 7(2) of the *Act* (but does have the support of not less than forty-five percent of them) and where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in the manner that is consistent with the Legislative primacy of the membership evidence as the means by which employee wishes with respect to certification are determined.

13. The primacy of membership evidence is unaffected by recent amendments to the *Act* through Bill 40. Indeed, the current structure of the *Act's* certification rules - in particular, the requirement that petition evidence be filed before the certification application date - means that it will always be possible for there to be membership cards that post-date a timely petition. The employer's proposal of a shift in evidentiary burden in such circumstances contradicts the continued "Legislative primacy of the membership evidence".

14. The Board proceeded to hear the evidence offered by the objecting employees in support of the 34 petitions. In measuring the evidence the Board must determine whether the objecting employees have met the onus of establishing that the petition is voluntary. The details of that test were summarized by the Board in *Custom Foam Specialties Limited*, *supra*, at para. 11:

11.... The onus of establishing that a petition is voluntary is on the employees objecting to certification. To do so, they must call witnesses to give evidence, based on personal knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which each signature was obtained. The cases are legion in which a failure to appear and give satisfactory firsthand evidence regarding the origination and circulation of a

petition has resulted in its rejection. Each and every signature on a petition must be identified and the circumstances under which it was obtained must be recounted by a person having personal knowledge thereof. Where such evidence is not presented, the signature may, and likely will, be discounted. In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be, managerial. Similarly, where managerial personnel, or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed. ...

15. Beyond testing the evidence for any actual employer support, the Board also considers the overall environment of the workplace when assessing the voluntariness of the petition. Even in the absence of any actual employer support, the Board must decide whether reasonable employees would perceive management involvement. Moreover, the Board must consider whether reasonable employees would perceive that management might learn who did or did not sign the petition. As the Board observed in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 at para. 41:

"... actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

The Board stated the test in another way in *Benoma Metal Products Limited*, [1990] OLRB Rep. Sept. 917 at para. 6:

"... But even if management is not involved, the Board will still give the petition no weight where the evidence demonstrates that the manner in which the document was prepared or circulated would lead reasonable employees to conclude that management was involved in the petition or might become aware of who did or did not sign the document. ...

16. In addition, the objecting employees must provide detailed evidence of the custody of the petition. For example, the Board must be satisfied that "the petition was not being so loosely displayed that employees would fear its contents were likely to come to the attention of management, and feel themselves compelled to sign as a result" (see *Data Security Limited*, [1985] OLRB Rep. Aug. 1183 at para. 15).

17. Before hearing the evidence in support of the petitions, the Board provided information concerning the condition of the petition documents. This information was provided in a manner that maintained the secrecy of the identity of persons who signed the documents. In accordance with the Board's practice, names or signatures were described by "P numbers". We advised that the Board had identified what appeared to be 37 "P numbers", and that there were 23 documents. We described the general physical condition of the documents, including details of which documents appeared to be original hand-written documents and which appeared to be photocopied.

18. The petition documents fell into two categories. First, there were nineteen "individual petitions", i.e., each was signed by a single person. Second, there were two "list petitions", i.e., each with a number of names and/or signatures. We explained to the parties that we were uncertain of the exact number of signatories on the list petitions.

19. The first list petition included four signatures, plus one further name that had been crossed out with the hand-written comment "signed on other". As his oral evidence later disclosed,

the crossed-out name was that of Scott Oldham who, indeed, had signed a number of other documents.

20. The second list petition was especially confusing. Although the Board clerks had marked the document to include P22 - P35, we indicated that we believed there was duplication in these "P numbers". The document showed two columns titled "Sign" and "Print". Most signatories had both printed and signed their names. Most "P numbers" appeared by names under the "Sign" column. However, the Board clerks had assigned numbers P34 and P35 to names appearing under the "Print" column.

21. We advised that our review of the Board file - including specimen signatures provided by the employer - suggested that P28 (under the "Sign" column) and P35 (under the "Print" column) were duplicates, i.e., they appeared to indicate the same person. We also clarified that the representative of the objecting employees, Mr. Croteau, took a different position in respect of duplication of P28. His position was that P34 (not P35) was the signature version of P28, i.e., that P28 and P34 were the same person.

22. The Board advised of other apparent duplication in the P numbers. As eventually clarified by Scott Oldham's testimony, he appeared twice in the "P numbers": P36 was his individual petition and his signature also appeared on the second list petition as P32. Similarly, Robert Kelloway testified that P37 was his individual petition, and that P22 (on the second list petition) was his signature.

23. After giving the parties opportunity to consider this information, we invited Mr. Croteau to lead evidence in support of the petitions. In general, the evidence disclosed that Mr. Croteau was the originator of the petitions bearing the names of P1-P35. Mr. Oldham and Mr. Kelloway each prepared and delivered individual petitions marked by the Board as P36 and P37. Mr. Kelloway used one of the petition documents prepared by Mr. Croteau (intended for a single signature) to collect names on the second list petition, after which he returned the document to Mr. Croteau. With the exception of P36 and P37, Mr. Croteau was responsible for delivery of the petitions to the Board.

24. Mr. Croteau decided to prepare a petition after reading the "green sheet" (notice of certification application) posted in the shop on September 19, 1994. He was also influenced by "listening to the guys talk" about filing a petition. Although he understood that the petition would not be timely and could not be considered by the Board in the context of the original certification application, he decided to proceed. He believed that the union had insufficient support in that application and knew that his petition might be relevant in a subsequent application. By listening to 'shop talk', he "got an idea of who was not signing" and was able to conclude that the union lacked majority support. Similar evidence of prevalent 'shop-talk' emerged in the testimony of Scott Oldham, who admitted that there had been much talk about the union during work hours. For instance, Mr. Oldham's manager was able to learn of Mr. Oldham's opposition to the union simply by overhearing employees' discussions.

25. After hand-writing the petition, Mr. Croteau made an undetermined number of copies at a copy shop. He eventually made more copies - twenty, he guessed. He was unsure of how many copies he distributed and of how many extra copies he had at the end of his efforts.

26. On September 20, he obtained signatures in the morning just before working hours, and then during the lunch break in the area around where the lunch truck parked. At the end of the work day he distributed copies of the petition to employees as they exited through the company gate. The evidence of all witnesses indicated that, as a general rule, some of the managers might

appear at the lunch truck area during lunch break. Further, some managers might leave by the same gate where Mr. Croteau (and, later, Mr. Kelloway) distributed petitions and gathered signatures. The evidence also indicated that managers move around the shop floor throughout the work-day. Nonetheless, neither Mr. Croteau nor Mr. Kelloway saw any manager during the time of any of the signatures.

27. No one refused to take a copy of the petition. Some people signed immediately but most took the documents away. In fact, Mr. Croteau asked employees to take the document home and to consider whether they wished to sign. He told employees that their choice was “strictly confidential between myself and them, or of course, between them and anyone they could trust; if they wanted someone to know that was their business if they did it on their own.”

28. A number of employees who had taken copies away with them returned signed copies to Mr. Croteau at the shop on the morning of September 21. In the case of P3, the employee took a petition away from Mr. Croteau in the shop and returned the document later. There was no evidence of the circumstances in which these documents were signed, nor of what these employees did with the petitions while in their custody.

29. Mr. Croteau gave inconsistent testimony about what happened to the documents that were not signed. At one point he admitted that he could not know the number of those documents since he was unaware of how many documents he had distributed and had no record of recipients. As he put it, “I gave them to people; I don’t know what they did with them”. At another point, he claimed that P19, P20 and four other unidentified persons were the only recipients who had not returned the documents.

30. Aside from the individual petitions, Mr. Croteau was also responsible for the preparation and circulation of the first list petition. His evidence was inconsistent in explaining the circumstances that led to the preparation of this petition. Mr. Croteau initially said that he prepared this first list petition because P19 did not understand the wording of the individual petition. At another point in his testimony Mr. Croteau explained that he prepared this version of the petition because P18 and P20 were unhappy with the wording of the individual petition. In any event, it was not only P18, P19 and P20 who signed the first list petition. Mr. Croteau also offered this document for signature when he was approached by P21 and, at another point, by Scott Oldham.

31. Mr. Croteau explained that he prepared the first list petition during his lunch break. He wrote the text of the petition outside the shop, near a large generator parked against a fence. At about the same time, Mr. Oldham approached and indicated that he wished to sign a petition against the union. However, Mr. Oldham gave a contradictory version of the circumstances of his signature of the first list petition. According to Mr. Oldham, it was Mr. Croteau who approached and initiated discussion of the petition. Further, this did not occur outside the shop but, rather, in the “lock-up” area within the shop.

32. Robert Kelloway gave evidence about the “second list petition, which began as a copy of the “individual petition” prepared by Mr. Croteau. Mr. Croteau testified that he gave the petition to Mr. Kelloway at the end of the work day as he “was headed out the door”. Both witnesses claimed that there was no discussion about what Mr. Kelloway should do with the petition. Mr. Croteau claimed that he had no expectation that Mr. Kelloway would obtain other signatures. Mr. Kelloway repeatedly asserted that the two men had no discussion about what should be done with the document.

33. Most of Mr. Kelloway’s testimony concerned the signatures on the second list petition. He identified himself as P22. The signatures of P23-P28 were obtained on a lunch break in the area

around the company gate. He collected the remaining signatures at the end of the work-day at the company gate. Mr. Kelloway also testified that in displaying the document, he covered the signatures with his hand so that other signatories' names could not be seen.

34. In reviewing the original document, with "P number" notations inscribed by Board clerks, Mr. Kelloway initially said, "I don't understand P34 and P35." When the Board asked him if either was a printed version of a signature in the other column, he replied: "no, they're signed". P35, he asserted, signed before P30. He could not recall when P34 signed. When asked whether he could recall the identity of the first person that he saw during the after-work session of signature collection, he said, "I think it was P35". When asked whether P35 might have signed before P34, he replied, "yes, I think so".

35. There are obvious problems in this testimony about the second list petition. P34 and P35 were the sixth and seventh of the twelve names in the right-hand "print" column. P35 was below P34, and P30 was below both P34 and P35. Given Mr. Kelloway's description of the manner in which he presented the document to signatories, one would expect that the names would appear in a column in the order in which they were obtained. Yet Mr. Kelloway's evidence suggests that both P34 and P35 found spaces between other signatures in which they inserted their names. If this is so, we cannot understand how Mr. Kelloway managed to cover the other names with his hand. (Did P34 and P35 sign between his fingers?) We cannot conclude that Mr. Kelloway kept the names of all signatories hidden as each person signed the second list petition.

36. More importantly, the objecting employees never addressed the Board's concern regarding the duplication of names between either P28 and P34 or between P28 and P35. As we explained to the parties at the outset of the hearing, our review of specimen signatures led us to conclude that P35 duplicated P28; in particular, it appeared that P35 was the printed version of the signature appearing as P28. Nonetheless, Mr. Croteau, as representative of the group of objecting employees, took the position that P34 was the printed version of P28. The Board's review of the specimen signatures did not support that position since the specimen signature for P34 bore no resemblance to the signature appearing as P28. Mr. Croteau never offered evidence to support his position. Indeed, the evidence of his witness, Mr. Kelloway, contradicted his position. In Mr. Kelloway's story, P28 and P34 and P35 were three separate signatures representing three different employees.

37. We also find it improbable that Mr. Croteau and Mr. Kelloway had no conversation about the document. Mr. Croteau testified that he gave a standard line about confidentiality and voluntariness to the other recipients of the individual petitions. All of these employees received the document at the shop gate. Yet Mr. Kelloway received the petition in unique circumstances. Mr. Croteau gave it to him elsewhere, and did not give his usual caution about the confidentiality of the document.

38. In summary, there are numerous contradictions and inconsistencies in the evidence of Mr. Croteau and Mr. Kelloway. This is troubling given that a simple count of "P numbers" leads inescapably to the conclusion that Mr. Kelloway's participation was critical in ensuring a numerically successful petition. Both admitted that Mr. Croteau knew relatively few of the employees, whereas Mr. Kelloway regular contact with most of the employees.

39. Our review of these salient facts leads us to conclude that the objecting employees have failed to establish the voluntariness of the petitions. We find no evidence of any direct involvement of the employer, but we conclude that the manner in which the petitions were circulated would lead reasonable employees in this workplace to conclude that management might become aware of who did or did not sign the petition. Indeed, Mr. Oldham's manager was aware that a number of

employees were opposed to the union, including Mr. Oldham. The testimony of Mr. Croteau and Mr. Oldham disclosed that there was open discussion in the shop about opposition to the union and, more importantly, about the fact that Mr. Croteau was circulating a petition. In this environment, the key circulators of the petition openly sought the support of fellow employees on or at the edges of company property at times when managers might have appeared.

40. Mr. Croteau's loose distribution of the individual petition documents also causes us concern. Mr. Croteau was unable to account for the distribution of the documents. He did not know how many documents he distributed, nor what became of the documents not returned to him. Furthermore, he invited employees to discuss the petition with anyone they trusted. Given the circumstances of distribution (whether at the shop gate, or in the vicinity of the lunch truck, or in the shop itself during working hours), we conclude that employees were aware that most or all fellow employees had seen a copy of the document. Further, many employees were aware that those who chose to take away the document might show it to anyone they trusted. Since any one of those who took away documents and who was interested in supporting Mr. Croteau's efforts was required to return the document to him the next day at work, it is reasonable to conclude that employees might surmise that anyone who spoke with Mr. Croteau the next day opposed the union. We also conclude that those who were approached by Mr. Croteau on or near company property would similarly have reason to believe that others would be aware of whether they signed or did not sign. These conclusions are supported by Mr. Croteau's and Mr. Kelloway's evidence that Mr. Croteau did not generally interact with many of the employees in the shop.

41. As for those petitions which were signed elsewhere and later returned to Mr. Croteau, we cannot accept those as voluntary expressions of the employees' wishes since we have no evidence whatsoever of the circumstances in which those employees signed.

42. In the case of the first list petition circulated by Mr. Croteau, there was inconsistent and contradictory testimony regarding its origination, preparation and circulation. Accordingly, the objecting employees failed to provide sufficient evidence to discharge the onus of establishing the voluntariness of that petition.

43. In the case of the second list petition, Mr. Kelloway's evidence left us with unanswered questions about the number and identity of persons who actually signed. Furthermore, we must conclude that a number of persons were able to review the signatures of others when signing the document. Combined with a workplace environment characterized by open discussion of the union, we find it likely that employees would perceive that others (including managers) might learn whether they signed this petition.

44. As a result we find that, except for each of their individual petition letters and that of Mr. Oldham, the petition evidence presented by Mr. Croteau and Mr. Kelloway does not satisfy the onus of establishing that the petitions were voluntary. We find it unnecessary to determine whether the familial relationship between Mr. Kelloway and two managers and Mr. Croteau's purported special relationship with managers would undermine the voluntariness of signatures obtained by either of them.

45. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit described in paragraph 3 were members of the applicant on the certification application date.

46. A certificate will issue to the applicant.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; January 25, 1995

1. I cannot deny that the decision conforms with the *Labour Relations Act* and existing case law.
2. However, neither can I associate myself with the general characterization of findings based on the evidence concerning the organization, circulation, and custody of the petitions, nor the overall environment of the workplace.
3. My colleagues found “no evidence of any direct involvement of the employer”. Nor did the union allege any impropriety on the part of the employer.
4. The decision describes the activities of the objectors and their evidence offered as proof of the voluntariness of the statements of desire not to have the union certified. Their efforts are found wanting not because of any proven, or even alleged, involvement of the employer but, rather, because of a perception on the part of the Board that reasonable employees would have been led to conclude that management might become aware of who did or did not sign the petition.
5. Persons familiar with case law and errors of omission or commission the Board deems prejudicial to petitioners might be hard put to conceive of any mistakes these objectors failed to make. Indeed, using case law as criteria, the objectors left themselves vulnerable on so many counts it would be totally illogical to conclude that anyone with a sense of organization, let alone even a rudimentary knowledge of labour law, was behind the scenes.
6. Having said all of the foregoing, and acknowledging the observation of the majority as to “the Legislative primacy of the membership evidence as the means by which employee wishes are to be determined” I cannot disagree with the resulting decision.

1959-94-JD Board of Governors of Algoma University College, Applicant v. Algoma University College Staff Association and Algoma University College Faculty Association, Responding Party

Jurisdictional Dispute - University's faculty association and staff association disputing assignment of certain library reference desk and library tour work - Board confirming university's assignment of disputed work to members of both faculty association and staff association

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *Scott Williams, Patricia Burt* and *Susan Scott* for the applicant; *Michael Wright, Mark Stevenson, Penny Tyrrel* and *Sheila Turkington* for the Algoma University College Staff Association; *Kevin Banks, Dr. Krishna Kadiyala* and *Bob Moore* for the Algoma University College Faculty Association.

DECISION OF THE BOARD; January 18, 1995

1. This jurisdictional dispute complaint filed pursuant to section 93 of the *Labour Relations Act* (“the Act”) was filed with the Board on September 2, 1994.

2. Pursuant to section 93 (1.1) of the Act the Board considered the complaint, consulted with the parties and conducted an inquiry into the matters raised by the complaint on January 11, 1995. At that time the Board found it unnecessary to entertain *viva voce* evidence. Each of the parties filed extensive, thorough and detailed briefs and written submissions which clearly articulated the issues in dispute, the evidence each viewed as relevant with respect to those issues, and the arguments each party proposed to advance in support of their respective positions. In addition, on January 11, 1995 legal counsel on behalf of each of the parties made oral submissions to the Board. In so doing counsel referred to the pleadings and submissions as filed together with arbitrable jurisprudence and the Board's own decisions. Given the depth of the pleadings we do not consider it necessary in this decision to set out in detail the issues in dispute or the relevant evidence. Similarly it is unnecessary to write at length about the criteria generally considered by the Board in resolving jurisdictional dispute complaints. These criteria are now well established. (See for example, *Pioneer Manor - Home of the Aged*, [1993] OLRB Rep. May 447 at paragraph 15 and the cases referred to therein)

3. Having carefully considered the pleadings and submissions of the parties, and upon application of the criteria generally considered in complaints of this nature we have concluded that the work in dispute, namely:

Reference activity:

Sitting at the reference desk, particularly at the following times:

Monday, 10:00 a.m. to 12:30 p.m.;

Tuesday, 12:30 to 2:30 p.m.;

Wednesday, 3:00 to 4:30 p.m.;

Thursday, 4:30 to 8:30 p.m.; and,

Conducting Library tours for the University's students.

has been properly assigned by the applicant employer, Board of Governors of Algoma University College ("Algoma" or "the Employer") to members of both the Algoma University College Staff Association ("the Staff Association") and members of the Algoma University College Faculty Association ("the Faculty Association").

4. In our view the work in dispute, although "normally performed" by members of the Staff Association, is not work which has been exclusively performed by members of the Staff Association. The work in dispute is also "normally performed" by members of the Faculty Association. There is a clear overlap in jurisdiction and a reasonable, legitimate, and competing claim to the work in dispute by both the Faculty Association and the Staff Association.

5. The librarians who are members of the Faculty Association have in the past, and continue at present to provide "reference services" to library patrons. Staff Association members also provide those reference services. Members of both Associations have conducted tours of the library for students attending Algoma, community groups, etc. Although over the years the *location* of the provision of reference services may have changed (i.e. from separate areas in the Library staffed by members of either or both the Staff Association and the Faculty Association to the current central "reference desk"), the *nature* of the work in dispute i.e. providing reference services has not changed. The employer's own past practice (and the predominant practice of other academic institutions throughout the province) is to have "reference work" and library tours performed or conducted by members of both the Staff and Faculty Associations.

6. The present scheduling of librarians who are members of the Faculty Association to work at the "reference desk" two hours a week, four days a week, is substantially similar in terms of the nature and/or quality of the work as the reference work performed in the past by the Head

of Technical Services or Head of Public Services (librarian positions within the Faculty Association's bargaining unit) and the reference work which at present the librarian may continue to do on a daily basis, i.e. Faculty Association members may respond to reference inquiries from library patrons, whether those are placed at the "reference desk" or not. The only change which has occurred is that Faculty Association members are now scheduled to take their turn sitting at the reference desk to provide the same type of reference services that they have provided in the past, (and the same type of front line reference services which Staff Association members also provide while sitting at the reference desk).

7. We have considered the fact that for the past several years only Staff Association members have staffed the "reference desk". We do not however consider that fact to be determinative of this matter given the additional circumstances which existed. During this period of time, for budgetary reasons, the Head of Public Services' position remained unfilled. As a result there was not a Faculty Association member in the library able to provide reference service. Mr. Chin (Head of Information Services) the other Faculty Association member is physically challenged. In order to accommodate him the Employer has temporarily removed reference services from his responsibilities. During this interval therefore, and while the Faculty Association position remained unfilled, the Employer did not have a qualified professional librarian (Faculty Association member) in place to staff the "reference desk". Nonetheless, the Employer has in the past, and continues at present, to require the services of a qualified professional library whose duties include, *inter alia*, the provision of reference services and conducting library tours. That position, and that need has now been met with the hiring of a professional librarian to fill the Co-ordinator of Information Services' position. From Algoma's perspective it has always been important to have such a professionally qualified person on staff to provide such services. For a period of time financial exigencies prevented it from filling the vacant Head of Public Services' position with a professional librarian. It has now, in effect remedied that situation by its creation of a (downgraded) Co-ordinator of Information Services' position in the Faculty Association bargaining unit.

8. Finally, even if one characterizes the provision of "front line reference services" as an identifiable set of duties attributable to Staff Association members, that same identifiable set of duties is *also* attributable to the classification of librarian in the Faculty Association's bargaining unit — the duties are not exclusive to members of the Staff Association. Members of either Association may have additional duties and responsibilities to perform, but insofar as reference services or conducting library tours are concerned their duties and responsibilities (although clearly identifiable) are indistinguishable from each other and common to both bargaining units. Thus, when the librarian who is a Faculty Association member performs the work in dispute he/she is performing work that is part of his/her normal duties. He/she is not performing work that "belongs" exclusively to the Staff Association bargaining unit. Rather, he/she is performing work that is normally performed by members of either Association.

9. On balance, having regard in particular to the collective agreement claims of both Associations to the work in dispute, the past practice of this employer, the "area practice" of other employers, and the factors of economy and efficiency, we confirm the employer's assignment of the disputed work referred to in paragraph 3 herein, to members of both the Faculty Association and the Staff Association.

0863-94-R Labourers' International Union of North America, Local 527, Applicant v. **Désourdy 1949 Paving Inc.**, Responding Party

Adjournment - Certification - Construction Industry - Practice and Procedure - Board Officer conducting examination into dispute over list and composition of bargaining unit - Counsel seeking adjournment following examination-in-chief of witness on ground that he was taken by surprise by evidence, and asking that Board rule on request - Board explaining importance of Board Officer examination process and observing that Board Officer in best position to rule on requests for adjournments and other procedural matters - Accordingly, as a general proposition, Board will uphold the Officer's procedural directions, absent a compelling reason to do otherwise - Board finding no compelling reason in this case not to confirm Officer's decision directing counsel to commence cross-examination forthwith

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

DECISION OF THE BOARD; January 23, 1995

1. The style of cause is hereby amended to reflect the correct name of the responding party: "Désourdy 1949 Paving Inc."
2. This is an application for certification arising in the construction industry, in which the parties are currently engaged in examinations before a Board Officer. Those examinations are dealing with challenges to the list, over whether certain individuals exercise managerial functions, or over whether they were performing bargaining unit work on the application date.
3. A procedural dispute has arisen. The examinations were taking place on, amongst other days, December 15, 1994. The next scheduled date for examinations was January 31, 1995. At approximately 4:00 p.m. on December 15, 1994, applicant counsel completed examination-in-chief of his witness, and the Board Officer then asked counsel for the responding employer to commence his cross-examination. Counsel refused, on the basis that he was caught by surprise by the evidence-in-chief of the witness, and needed an opportunity to investigate and to prepare before commencing his cross-examination. Counsel submits that the evidence-in-chief had not been disclosed to him through pleadings, and ought to have been.
4. Counsel asked that the Board rule upon his request. The Board Officer then advised the parties to make any submissions in writing, which they did. The question for the Board is whether counsel was entitled to an adjournment in the examinations for this reason.
5. Often in construction certification applications, where there is a dispute over the list and composition of the bargaining unit, the Board will appoint a Board Officer to conduct examinations into the matters in dispute. This process accomplishes several things.
6. First, and obviously, it saves Board panel time, while still ensuring an expeditious adjudication of the matters in dispute. The Board Officer conducts examinations, in which both the Board and the parties call the witnesses they feel are appropriate. A transcript is prepared of the examinations, placed before a panel of the Board, and the panel of the Board is able to then decide the disputed issues. All parties have full participation rights in the Board Officer's examinations, including the right to lead any evidence which they feel is arguably relevant, and to make full submissions.
7. A second reason for Board Officers conducting examinations derives from the nature of

the evidence. Often it is more practical to conduct examinations at or near the job site, something the Officer can better accommodate. As well, the Officer's investigative role (e.g. doing record checks) assists both parties in narrowing the dispute and in helping them prepare for the examinations.

8. But there is another potentially more important reason for referring the dispute to a Board Officer for examinations. A Board Officer works with the parties in a less formalized setting than a Board panel. He or she may have had prior dealings with either or both of the parties, or their counsel. An Officer in this position is better able to narrow the disputes, or to settle matters with the parties. Experience has clearly shown that it is quite common for a lengthy list of disputed issues to be resolved in short order, once a Board Officer is able to meet with the parties and to commence examinations. Parties see how the evidence comes out, they assess the strengths of their respective positions, and they are assisted by the Officer's knowledge and experience. The Officer can usually accurately predict how the Board itself will view the particular dispute, and is in a better position than a panel to sensitively assess the practical realities and concerns of the parties involved.

9. This is the context in which counsel submits that he was caught by surprise because the evidence had not been pleaded. Given the purpose of examinations before Officers, it is not apparent that a general requirement for comprehensive pleadings would be useful. Parties would have to suspend their efforts to narrow the issues and settle matters, in order to concentrate on pleadings. Proceedings would be extended, and the focus of the parties misplaced.

10. Where the dispute is over managerial functions, or what the individual was doing on the application date, the Board has not insisted that parties plead all the material facts in their knowledge. Moreover, given the nature of employment in the construction industry, it is not at all surprising that one party or the other (or both) might lack precise information about an individual's status or job functions on a particular day. With disputes of this nature, parties have generally only been required to plead sufficient material facts to enable the other side, and the Officer, to understand the nature of the dispute, and to allow them to properly prepare for the examinations. Practically speaking, the relevant material facts are often communicated orally through the Officer's early contacts with the parties, and are not usually recorded in detail in written form.

11. Parties are caught by surprise on some occasions. The Board Officers are aware of this potential, and where appropriate, the Officer grants an adjournment. But that is a decision that the Officer involved is best able to make. It is the officer who can best assess the progress of the examinations, and any delays caused by the parties.

12. Turning to the specific dispute, counsel for the responding employer requested an adjournment on the basis that he had been caught by surprise by the *evidence* led by the applicant. With respect, parties are not required to disclose in advance the *evidence* which they intend to lead. Nothing in the respondent's submissions indicates that it was not aware of the essential material facts, only that it was unaware of the evidence.

13. Counsel for the responding party took a significant risk by declining to follow the direction of the Board Officer that he commence cross-examination forthwith. While it is certainly true, as reflected here, that parties have the ability to request that the Board itself review an Officer's ruling, it is also true that parties who decline to follow a procedural direction of a Board Officer do so at their peril. As a general proposition, the Board will uphold the Officer's procedural directions, absent a compelling reason otherwise. To do otherwise would seriously undermine the ability of Officers to independently conduct examinations, and would too readily lead to interruptions in proceedings.

14. Here, there is no reason, compelling or otherwise, not to confirm the Board Officer's decision directing the responding party to commence cross-examination forthwith. In the Board's view, this was the correct decision in the circumstances.

15. We have considered whether to preclude the responding party from conducting cross-examination of the witness. This dispute arose towards the end of the hearing day. The next scheduled hearing day has not yet arrived, and therefore no meaningful hearing time has been lost. It thus appears that there is no prejudice in now allowing the responding party to cross-examine the witness. Fortuitously, for the responding party, this dispute arose at a time when, for all practical purposes, the cross-examination of the witness would not have been completed until the next scheduled hearing day in any event.

16. In these circumstances, we are prepared to grant the responding party a second opportunity to cross-examine the witness, when the examination re-commences on January 31, 1995, and we so direct.

17. As noted, parties ought to expect that in future examinations or inquiries, failure to comply with a Board Officer's procedural direction will likely mean an opportunity lost forever.

18. This matter is referred to the Board Officer for continuation of the Board examinations as previously scheduled.

2016-93-G Sheet Metal Workers' International Association, Local 30, Applicant v. Duffy Mechanical Contractors Limited, DuraSystems Barriers Inc., Responding Parties

Construction Industry - Construction Industry Grievance - Board finding employees of responding party to be construction employees and holding that, when engaged in fabrication of ductwork destined for ICI job site, their work is covered by ICI agreement

BEFORE: *D. L. Gee*, Vice-Chair and Board Members *F. B. Reaume* and *R. Weiss*.

DECISION OF D. L. GEE, VICE-CHAIR, AND BOARD MEMBER R. WEISS; January 30, 1995

1. This is an application under section 126 of the *Labour Relations Act* (the "Act"). This application was filed with the Board on September 21, 1993 in conjunction with a related section 1(4) application (Board File No. 2017-93-R) in which the applicant sought a declaration that Duffy Mechanical Contractors Limited ("Duffy Mechanical") and DuraSystems Barriers Inc. ("DuraSystems") are one employer for the purposes of the Act. The instant application was adjourned pending determination by the Board of the section 1(4) application.

Issue

2. The section 1(4) application initially came on for hearing before a panel of the Board chaired by Vice-Chair Stamp at which time the respondents raised a preliminary issue that the ICI agreement does not cover the fabrication work performed in the shop of Duffy Mechanical. By decision dated June 13, 1994 the Stamp panel ruled that, if the work was work in the ICI sector of

the construction industry, it was covered by the agreement, and, if it was not work within the ICI sector of the construction industry, it was not. The matter was then relisted for hearing before the instant panel of the Board. For reasons set out in the Board's decision of August 30, 1994, the parties litigated the section 1(4) application while deferring determination of whether the ICI agreement applies to the shop of Duffy Mechanical and/or DuraSystems, to the instant application. In its decision of August 30, 1994, with respect to the section 1(4) application, the instant panel ruled that the respondents are to be treated as one employer for the purposes of the Act and declared that DuraSystems is bound to the ICI agreement as if it had been a party thereto.

3. The instant application was then listed for hearing on November 28 and 30, 1994 for the sole purpose of hearing the parties' evidence and representations on the issue of whether the work performed by DuraSystems falls within the ICI sector of the construction industry.

Facts

4. The parties agreed that evidence adduced at the hearing with respect to the section 1(4) application could be considered by the Board in determining the instant application. We do not propose to review the evidence in detail except to the extent necessary given our determination in this matter. Detailed facts with respect to the products and operations of both Duffy Mechanical and DuraSystems are set out in the Board's decision of August 30, 1994 [1994] OLRB Rep. Aug. 992.

5. Duffy Mechanical is both a fabricator and installer of ductwork. Ninety to 95 percent of the fabrication work done by Duffy Mechanical is ductwork for the ventilation portion of projects within the ICI sector of the construction industry. Duffy Mechanical installs all of the ductwork it fabricates and does not act as a supplier of ductwork to other contractors for installation. Duffy Mechanical currently employs approximately three employees in its fabrication shop and 20 to 25 installers. Duffy Mechanical has applied the ICI agreement to its shop for the past 20 years. Duffy Mechanical asserts that it has done so voluntarily and not because the work performed in its shop is covered by the ICI agreement. Duffy Mechanical's shop employees participated, without complaint from Duffy Mechanical, in the 1988 and 1990 strikes under the ICI agreement.

6. DuraSystems fabricates sheets of durasteel into various products. The applicant only claims that the fabrication of *ductwork* which is subsequently installed on an ICI job site is covered by the ICI agreement. During the period July 1992 to July 1993 ductwork accounted for 38 percent of DuraSystems' sales. DuraSystems does not do any installation work. The ductwork fabricated by DuraSystems is sold to contractors who install it on ICI projects using sheet metal workers. In one instance, ductwork was sold to Duffy Mechanical and installed on an ICI job site by installers employed by Duffy Mechanical.

7. It is estimated that between 350 and 500 contractors are signatory to the ICI agreement. Sixty, and perhaps as high as 75, percent of those contractors have fabrication shops that produce ductwork. They do so under the ICI agreement. Two contractors were identified as operating only fabrication shops, i.e. they do no installation work. These contractors fabricate ductwork under the ICI agreement. Those contractors that do not have fabrication shops purchase ductwork from one that does. There was no evidence of ductwork, destined for an ICI job site, not being fabricated under the ICI agreement.

8. Mr. Bert Gardner, the Executive Director of the Ontario Sheet Metal and Air Handling Group, the Employer Bargaining Agency, was called as a witness by Local 30. Mr. Gardner's job includes administering the ICI agreement. Mr. Gardner testified as to the facts in the preceding paragraph and further testified that it is the EBA's position that the ICI agreement covers every-

thing, including shop fabrication, contained in the air stream system. That is why the ICI agreement defines "employee" and "member" as including individuals employed "in the shop". Mr. Gardner testified that he was not aware of any companies that fabricate ducting outside of the ICI agreement. During the 1988 and 1990 strikes, shop employees participated without challenge from contractors.

9. Local 30 is signatory to what is referred to as a "production" agreement with approximately 13 contractors. All 13 of the contractors in question are also signatory to the ICI agreement. Mr. Collins, a Business Representative of Local 30, testified that no contractor performs ICI work under a production agreement. Amongst the contractors signatory to a production agreement, some, such as Chicago Blower and Royce Metal Products Limited, do not perform any work claimed under the ICI agreement. With one exception, all of the production agreements specifically state, in the recognition provision, that the agreement excludes work under the ICI agreement. Mr. Collins testified that items such as dampers, grills and fire stop flaps, which are installed on ICI job sites, are produced under the production agreement on the basis that they are production or mass produced items. Mr. Collins disagreed with the suggestion that spiral pipe or metal flex destined for an ICI job site is manufactured under a production agreement. In any event, Mr. Collins testified that spiral pipe and metal flex are mass produced by a machine such that it is not comparable to the fabrication of ductwork. There was no evidence of traditional ductwork destined for an ICI site being fabricated under a production agreement.

Argument

10. Counsel for the respondents argued, based on the definition of "construction industry" contained in section 1 of the Act, that the work performed by DuraSystems' employees is not work within the construction industry because the work is not performed "at the site". It was argued that the definition of "employee" set out in section 119 of the Act is only applied where some part of the employee's work is at the site. Finally, it was argued, that work which is claimed by the Sheet Metal Workers under the ICI agreement, such as the manufacture of spiral duct and paint booths, is being performed under a production agreement. The Sheet Metal Workers cannot pick and choose what work is to be done under the ICI agreement and what work is to be done under a production agreement.

11. Counsel for Local 30 disputed the suggestion that the work in question is not work within the construction industry and that a worker must go to the site to fall within the definition of "employee". Counsel argued that DuraSystems' shop employees fall within the definition of "employee" because they have a direct connection to the site. Ductwork fabricated by DuraSystems is installed by sheet metal companies using sheet metal workers. The only reason for fabricating any particular piece of ductwork is the ICI site to which it is destined. Counsel argued that there is no evidence of ductwork being fabricated under a production agreement, but if such was occurring, the production agreement in question would be null and void as the work must be done under the ICI agreement.

Decision

12. "Construction industry" is defined in section 1 of the Act as follows:

"construction industry" means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site.

“Employee” is defined in section 119 of the Act as follows:

“employee” includes an employee engaged in whole or in part in off-site work but who is commonly associated in work or bargaining with on-site employees.

13. The definition of “employee” was introduced into the construction industry provisions of the Act in 1970. Shortly, thereafter, in 1972, in *Hamilton and District Sheet Metal Contractors Inc. v. Sheet Metal Workers’ International Association Local Union 537 Hamilton Ontario Branch et al.* (unreported, Board File No. 384-71-R) [now reported at [1971] OLRB Rep. Sept. 562], an application for accreditation, the Board commented on the effect of the definition as follows:

7. The agreement upon which this application is based deals with sheet metal workers who engage in both on-site work and work in various sheet metal shops. The definition of “construction industry” in the Act refers to on-site work. The recent amendments to the Act, however, extend the definition of “employee” in the construction industry provisions of the Act to those who are engaged in whole or in part in off-site work but who are commonly associated in their work or bargaining with on-site employees. It would appear, therefore, that the unit of employers in this application can extend to the whole of the bargaining rights of the respondent set out in the collective agreement and still come within the construction industry provisions of the Act, and therefore be the subject matter of an application for accreditation.

The Board thus determined that, following the introduction of the definition of “employee” into the Act, the construction industry provisions were no longer confined to work performed at the site but were also applicable to work performed by employees engaged in whole or in part in off-site work provided they are commonly associated in their work or bargaining with on-site employees.

14. The Board’s determination in *Hamilton and District Sheet Metal Contractors Inc.* was endorsed by the Board in *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682 as follows:

17. ... Prior to the enactment of what is now section 117(b) [now section 119] in 1970, the Board excluded shop, yard and other off-site employees from construction industry bargaining units. Subsequent to the enactment of that provision, the Board has had to determine, as a question of fact, whether employees engaged in off-site work are commonly associated (in their work or bargaining) with the on-site employees in question. The wording of section 117(b) is such that, once the Board finds that an employee is so commonly associated, such an employee must be considered to be a construction employee. The Board has no discretion to find that s/he is not.

(See also *Ridsdale Steel Fabricators Inc.*, [1987] OLRB Rep. April 601 at paragraph 10.)

15. As a result of the introduction of the definition of “employee” into the construction industry provisions of the Act in 1970, it is no longer necessary for work to be performed at the site in order for the construction industry provisions of the Act to apply. The definition of “construction industry” must now be read subject to the definition of “employee” in section 119. Thus, a question which we must determine is whether the employees who work exclusively in DuraSystems’ shop (entirely off-site) are commonly associated in their work or bargaining with on-site employees. If they are so commonly associated, they are construction employees, and the work they perform in connection with the fabrication of ductwork destined for ICI construction site, is covered by the ICI agreement.

16. It is our determination that the employees employed exclusively in DuraSystems’ shop are construction employees as they are commonly associated (at least) in bargaining with on-site employees. Our reasons follow.

17. The applicant is claiming only that portion of the fabrication work performed by DuraSystems' employees in connection with ductwork destined for an ICI job site.

18. As the facts set out above indicate, between 350 and 500 contractors are bound to the ICI agreement. Sixty to 75 percent of those contractors operate fabrication shops that produce ductwork. All of those shops operate under the ICI agreement. There are two contractors who, similar to DuraSystems, fabricate ductwork but do not install it. Both operate their fabrication shops under the ICI agreement. Contractors who install ductwork on ICI job sites but do not operate a fabrication shop, purchase ductwork from one of the contractors that fabricates ductwork under the ICI agreement. We heard no evidence of ductwork which was later installed on an ICI project being fabricated under any agreement other than the ICI agreement. Thus, the evidence before us is that all contractors bound to the ICI agreement who fabricate ductwork for ICI job sites do so under the ICI agreement. During the 1988 and 1990 strike under the ICI agreement, employees engaged in shop fabrication participated in the strike without challenge from the EBA or individual contractors.

19. The EBA responsible for negotiating the ICI collective agreement is of the view that the agreement covers shop fabrication of ductwork. The ICI agreement defines "employee" and "member" as inclusive of individuals employed "in the shop". The language of the ICI agreement supports the EBA's assertion that the shop fabrication of ductwork is covered (see the Stamp panel's decision of June 13, 1994 in Board File 2017-93-R for specific references to the ICI agreement). As the preceding paragraph indicates, the ICI agreement has been consistently applied throughout the industry in a manner consistent with the EBA's position that it covers shop fabrication of ductwork.

20. Duffy Mechanical itself has applied the ICI agreement to its shop fabrication for the past 20 years.

21. The definition of "employee" for the purposes of the construction industry provisions of the Act includes an employee engaged entirely in off-site work provided such employee is commonly associated in (work or) bargaining with on-site employees. In our view, the evidence before us establishes that employees engaged in the shop fabrication of ductwork are commonly associated in bargaining with the on-site employees who install the ductwork. Both groups of employees have been consistently considered by the parties to the ICI agreement to be covered by its terms. When a strike under the ICI agreement occurs, both groups of employees, without challenge by any party to the agreement, go out on strike. As the decision in *Hamilton and District Sheet Metal Contractors Inc.* indicates, in 1972 this Board accredited an employer's organization to represent employers who employ sheet metal workers who engage in on-site work and work in sheet metal shops. Hence, there has been a long-standing practice in the sheet metal industry for employees who fabricate ductwork off-site in fabrication shops to be associated in bargaining with on-site employees. On this basis, it is our determination that the employees of DuraSystems are construction employees and, when they engage in the fabrication of ductwork destined for an ICI job site, their work is covered by the ICI agreement.

22. This matter will continue on February 1, 2 and 3 to deal with all remaining issues.

23. This panel is seized.

DECISION OF BOARD MEMBER F. B. REAUME; January 30, 1995

1. I respectfully dissent from the majority award in this case as I do not find that Duffy's shop is covered by the ICI agreement for any fabrication work.

2. I am brought to this decision by the scope of the collective agreement, the definition of the construction industry in the Act and the more compelling argument of the responding party in this case.

3. Clearly article 3 states "This is a provincial agreement within the meaning of the *Labour Relations Act* of Ontario and as such applies to the industrial, commercial and institutional sector of the construction industry".

4. The "construction industry" as defined in section 1.1 of the Act:

"means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipelines, tunnels, bridges, canals or other works *at the site* thereof."

(emphasis added)

5. The definition of "employee" in section 119 recognizes an employee engaged in whole or in part in off-site work but who is commonly associated in work or bargaining with on-site employees. It is equally clear that the decision to utilize these tradesmen off-site is a voluntary business decision of the employer.

6. The applicant claims that duct work fabrication is covered off-site by their agreement because the ductwork will be installed on an ICI project. The evidence showed that there are other air handling items for use on ICI projects and fabricated off-site in shops that the applicant doesn't require that a journeyman construction sheet metal worker fabricate under the ICI agreement. It just isn't reasonable that the applicant can pick and choose what products must and what products need not be produced under the ICI agreement for installation on an ICI project.

7. DuraSystems is not handling tin sheets. It is a sandwich panel product with a number of uses involving fire protection and is new to Canada. Its use as a fire protective ductwork system replaces the need for the conventional tin ductwork and protective sheath applied by at least one other trade. Even the installation could lead to a jurisdictional dispute.

8. As concluded in *Metro Railings Ltd.*, (Board File Nos. 2265-86-R, 2266-86-R, 2267-86-R) [now reported at [1986] OLRB Rep. Dec. 1731]:

"...employees who perform shop work only do not come within the definition of employee in section 117(b) [now 119] since they are not commonly associated in work with the on site employees".

This is clearly the case with DuraSystems shop employees.

9. Nothing changes the scope of the agreement although it does provide that journeymen and apprentices working in the shop *when assigned by the employer* will receive the same terms and conditions as provided in the provincial ICI agreement.

(emphasis added)

10. Furthermore, if the scope of the ICI agreement is interpreted to include shops, then all of the shop agreements with this union are illegal since there can only be one agreement in the ICI sector. Article 3.1 cannot be interpreted to include shops.

11. As a result of all the above, I would find that shop fabrication is not covered by the ICI agreement and dismiss the grievance.

3253-94-JD The International Brotherhood of Painters and Allied Trades and The Ontario Council of The International Brotherhood of Painters and Allied Trades, Local Union 114, Applicants v. Labourers International Union of North America, Local 247 and **Ellis-Don Construction Ltd.** and J.P. Matte Peintures Ltee., Responding Parties

Construction Industry - Jurisdictional Dispute - Painters' union and Labourers' union disputing assignment of work involving removal of lead-contaminated plaster, its bagging, and its further removal from site - Board holding that work should have been assigned to Labourers' union

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *J. H. Irvine*.

APPEARANCES: *Brian G. Whitehead* and *James Andrews* for the applicants; *John Moszynski*, *Victor Claro*, *George Oliveira* and *Tony Sousa* for Labourers, Local 247; no one appearing for Ellis-Don or J.P. Matte.

DECISION OF THE BOARD; January 26, 1995

1. This is a complaint concerning a work assignment, filed pursuant to provisions of section 93 of the *Labour Relations Act*.

2. The Board held a consultation on January 26, 1995, and provided the following oral decision at its conclusion:

We are not going to call on counsel for the Labourers to respond.

Here the work in dispute was the removal of lead-contaminated plaster, its bagging, and its further removal from the site.

In our view, the work in dispute does not appear to include the special containment and safety features associated with such removal. We reach no firm conclusion on whether J.P. Matte and its painters were doing this work, as is asserted before us by the Painters.

However, if in fact the Painters were involved in the proper containment and safety procedures, we decline to confirm that assignment.

With respect to the removal of the lead-contaminated plaster, we are satisfied that this work should have been assigned to the Labourers. The Labourers have the relevant practice in the Board area in question, and the Painters do not. Further, there is no indication that Painters are any better able to perform this work than are Labourers.

Indeed, Labourers have significantly greater experience with plaster removal.

We are not persuaded it makes sense to sanction the development of a different procedure because the plaster being removed contains lead.

This decision is not meant to comment on any entitlement of the Painters to perform lead-abatement.

Therefore, our decision is that the work in dispute, consisting of the removal of plaster, whether lead-contaminated or not, its bagging, and subsequent removal, should have been assigned to the Labourers.

2865-92-U William Hill Jr., Applicant v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938, Responding Party

Duty of Fair Representation - Unfair Labour Practice - Board finding union's decision not to take applicant's discharge grievance to arbitration arbitrary and in bad faith, contrary to section 69 of the Act - Application granted - Board remitting question of remedy to parties

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *C. J. Abbass* and William Hill (Jr.) for the applicant; *Steve Lavender*, *Ray Bartolotti* and *Joe McGlade* for the responding party.

DECISION OF THE BOARD; January 25, 1995

1. The name of the responding trade union is amended to: "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938."

I

2. This is an application under section 91 of the *Labour Relations Act*. Originally, the applicant complained that the responding trade union ("Local 938") had dealt with him in a manner contrary to sections 69 and 70 of the *Labour Relations Act*. The applicant did not pursue his allegation that Local 938 had breached section 70.

3. Section 69 of the *Labour Relations Act* establishes a duty of care on trade unions, commonly referred to as the "duty of fair representation". It provides that:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

4. In essence, the applicant alleges that Local 938 dealt with his July, 1992 and October, 1992 discharge grievances in a manner contrary to section 69.

5. Prior to coming before me on November 18, 1994, this matter and three other similar applications came before the Board (differently constituted) on March 22, 1993. Although the four applications were listed to be heard together, the Board determined that they were discreet matters, unrelated except in time and the fact that there is a common responding party (and employer). At the March 22nd hearing, Local 938 moved that the application be dismissed because it lacked particularity and failed to disclose a *prima facie* case. The Board agreed that the application lacked particularity, but in light of "the nature of the case and the inexperience of the complainant in matters before the Board" allowed him to give oral particulars.

6. Subsequently, by decision dated April 20, 1993, the Board recorded the oral particulars provided by the applicant, and then denied Local 938's motion for dismissal as follows:

...

14. ... In the Board's view, there is sufficient material pleaded to warrant the matter being sent on for hearing. Addressing only the case as stated by the complainant, we observe that this complaint involves a discharge grievance, arguably the most serious kind of a grievance. The complainant's position amounts to there having been no culminating incident, and he cites examples of what would appear to be more serious misconduct where equally serious consequences did not follow. As well, it seems that the union may have processed those other matters to arbitration. He is not in a position to explain the difference in treatment he alleges occurred in this case.

7. The Board scheduled the application to be heard on August 17, 1993. That hearing was adjourned *sine die* on agreement of the parties. By letter dated August 4, 1994, some two weeks before the one year adjournment deadline expired, the applicant asked that a hearing be scheduled for August 15, 1994. At the request of Local 938, that hearing was rescheduled for October 24, 1994. The October 24, 1994 hearing was adjourned to November 18, 1994 on agreement of the parties.

II

8. At the hearing before me, counsel for the applicant said that he intended to assert that Local 938 had acted in bad faith in that its alleged failure to represent the applicant fairly was motivated by or resulted from the applicant's activities in an internal union election. Local 938 objected to this on the basis that this was the first time this allegation had been raised. In response, counsel for the applicant asserted that Local 938 should not be taken by surprise because this election issue had been raised by at least two of the other applicants when the four applications came on before the Board together on March 22, 1993, and that the applicant should continue to be given the same leeway in the presentation of his case as he was then because he initiated these proceedings as a lay person.

9. Upon considering the representations of counsel with respect to this issue, I ruled that the applicant would be restricted to the allegations in the particulars as set out in the Board's April 20, 1993 decision as aforesaid, and that evidence relating to the internal union election activities of the applicant or others was inadmissible in this proceeding.

10. The Board is sensitive to the difficulties which unrepresented parties face when they become involved in proceedings before the Board. As a result, unrepresented parties often receive some leeway in hearings before the Board, as the applicant did in this case at the hearing on March 22, 1993. However, the Rules of Procedure and the law applicable to proceedings before the Board are the same for all parties, whether they are represented or not. Choosing not to retain counsel or obtain other representation, or otherwise failing to properly inform oneself, does not relieve a party of the obligation to properly put forward and prove its case. A party cannot expect to find itself in a more advantageous position because it appears before the Board unrepresented. Further, in this case, the applicant was represented by counsel prior to and at the November 18, 1994 hearing.

11. The Board's Rules of Procedure (and the *Statutory Powers Procedure Act*) require that allegations of misconduct be particularized in a timely manner. This requirement is rooted in both legal and labour relations considerations. The legal consideration is that as a matter of natural justice a party against which allegations of wrongdoing are made must be given sufficient timely

notice of what those allegations are to enable it to know and prepare for the case it must meet. The labour relations consideration is that proceedings not be unduly delayed because of the prejudice which, as a general matter, is inherent in delay in labour relations matters.

12. When an allegation either has not been made or has been insufficiently particularized, the Board may not allow it to be pursued, or may require the particulars be provided. The Board's approach to "pleading" is generally more lenient than that of the courts. Consequently, the Board will usually not refuse to allow an allegation to be pursued unless it is so untimely or so lacking in particularity that it would be unfair or prejudicial to do so.

13. In its April 20, 1993, decision, the Board determined that this application was unrelated to the other three applications referred to by the parties (all three of which have been withdrawn in any event). Accordingly, the applicant was not entitled to rely on any allegations made in those other applications. Further, the applicant was the extraordinary opportunity to particularize his application orally as aforesaid, but mentioned nothing about any election issue, notwithstanding that at least two of the other applicants had done so before him. In the circumstances, it was reasonable for the Board and, more importantly, for Local 938 to infer that that allegation was not being raised by the applicant. Finally, in the nineteen months which elapsed between the Board's April 20, 1993 decision and November 18, 1994 when the matter came before me for hearing, the applicant gave no indication to anyone, in writing or otherwise, that he intended to make or pursue such an allegation. In the result, it would have been unfair to Local 938 to permit such an allegation to be raised and pursued.

III

14. The applicant became an employee of Cott Beverages Inc. ("Cott"), a soft drink manufacturer, at its Mississauga plant in April, 1991. He started as an "order-picker". After three months, he became a "forklift operator-receiver". In February, 1992, the applicant applied for an available "shipper/receiver" position. When he was unsuccessful, he grieved and was awarded the job through the grievance procedure. The grievor testified that Local 938 did little to assist him in this grievance and that he "won" is largely on his own. I find this unlikely and I prefer the evidence of Ray Bartolotti, the Local 938 Business Representative responsible for the bargaining unit at Cott's Mississauga plant, who said that he carried this grievance forward and was instrumental in the result.

15. On July 21, 1992, the applicant and another employee were suspended and then terminated for allegedly "leaving the facilities/workplace without permission for an extended period of time." Both employees grieved. As the matter progressed through the grievance procedure it became apparent that Cott was concerned not only that the applicant and the other employee had left the workplace, but also that they were off in a bar drinking at the time. The evidence reveals that Bartolotti set up a grievance meeting with the company but that his only discussion with the applicant about the matter was a brief one immediately prior to that meeting, following a similar grievance meeting with respect to the other employee. During a recess in the grievance meeting, the applicant and Bartolotti discussed the situation, again briefly. The applicant testified that he told Bartolotti that he was not going to admit he had done anything wrong and that he wanted the matter to go to arbitration. However, when the meeting resumed, Bartolotti told Cott that the applicant would admit that he had done something wrong but not what that something was.

16. It is apparent that Bartolotti's discussions with the applicant about the situation were incomplete. Bartolotti did not make a sufficient attempt to obtain the applicant's side of the story. Indeed, he did not discuss the drinking allegation with the applicant at all, even though he knew that was what concerned Cott the most. Further, Bartolotti did not reveal to the applicant the

information he had obtained in the course of dealing with the grievance of the other employee involved, which information he used as the basis for his decision to settle the applicant's grievance by agreeing to the substitution of a two-day suspension for the discharge.

17. In the result, however, the grievance was settled and the two-day suspension was substituted for the termination.

18. Around this same time, the applicant came under the supervision of a new supervisor and a new shipping/receiving system was implemented. The applicant was asked to do his paper work as he went along instead leaving it all until the end of his shift. The applicant testified that he said he would do so if he had the time.

19. In late October, 1992, the applicant was discharged. It appears that his shifts began during the morning of one day and ended early in the morning of the next. At the conclusion of his October 23rd and 24th shift, Paul Kurrat, Cott's Manager of Transportation & Warehouse, discovered the applicant in an office with his head down on his arm on the desk and thought him to be sleeping. Kurrat told the applicant to move his car from where it was parked near the loading dock and to "punch out".

20. It appears that the applicant worked at least one more shift, on October 25th to 26th, 1992, at the conclusion of which he was handed a termination letter dated October 23, 1992, as follows:

"This letter shall act as written confirmation of the termination of your employment with Cott Beverages.

The reasons for your termination are as follows:

- 1) On June 1, 1992 you received verbal instruction from the Warehouse Supervisor, Tim Price specific to processing your paperwork (recording shipments as the shift progresses, as opposed to batching paperwork at end of shift). You received repeated counselling from Tim Price subsequent to that, resulting in a written warning on June 17, 1992, delivered via internal company mail. There has been no improvement.
- 2) Your General Ledger coding on Bills of Lading, a daily requirement of your position has been incomplete and inaccurate, despite your receipt of a memo dated June 23, 1992, and subsequent counselling on this same issue from the Warehouse Supervisor, Tim Price.
- 3) There have been constant mathematical mistakes, errors or omissions on your shipping reports; this despite repeated counselling, from Tim Price subsequent to the same June 23, 1992 memo from the Warehouse Supervisor, Tim Price.
- 4) On July 21, 1992, you were terminated for being absent from your workstation. Teamsters Local 938 presented a grievance on your behalf, specific to your termination. The Company agreed to a settlement of a two-day suspension without compensation. This settlement was based on your admitting to the above infraction.
- 5) On August 20, 1992 you parked your vehicle in a non-authorized zone on the south-east corner of the warehouse. The Warehouse Supervisor, Dave Miller instructed you to move your vehicle. The Warehouse Supervisor, Tim Price that same date again asked you to move your vehicle. On August 27, 1992 it was again necessary for Tim Price to ask you to remove your vehicle from this zone. On that date you told the Warehouse Supervisor, Tim Price that you had it parked there because you were listening to a ball game.
- 6) On September 7, 1992 you were again instructed by the Warehouse Supervisor, Tim

Price to remove your car from the same unauthorized spot. Your response to his request was that it was parked there because you were washing tar off your vehicle.

- 7) You were given a verbal warning by the Warehouse Supervisor, Tim Price specific to sleeping at your workstation and making and taking phone calls of inordinate length, those calls not being work related, and on company time.
- 8) You have been observed by Paul Kurrat reading literature at your workstation that literature being non work related (obscene literature).
- 9) You have been verbally counselled for your general unwillingness to maintain warehouse cleanliness, by Tim Price (ie. leaking cases, product in wrong areas); and your reluctance to operate a forklift truck when required; the latter being a specific requirement of your job description. You require constant supervision.
- 10) On October 16, 1992 you met with Cott management to discuss shipping errors. Errors specific to your shift and to your function were:
 - consistent errors on Bills of Lading;
 - non-compliance with shipping procedures;
 - shipping to wrong locations, ie. a Toronto based warehouse instead of Montreal (Cott B.O.L. 899)
 - shipping damaged products
 - not checking forklift operator load sheets for errors or completion, despite having received a memo dated September 4, 1992 from the Warehouse Manager, Paul Kurrat regarding this requirement;
 - indicating wrong production Bills of Lading.

You have ignored continued counselling and written disciplinary action by your supervisors and Manager.

All of the above incidents and errors indicate a disregard on your part for the directions issued to you, both verbal and written, by the Supervisory and Management staff of Cott Beverages.

Your termination is effective October 26, 1992."

21. A grievance was filed and Bartolotti scheduled a grievance meeting with Cott. Because of a car breakdown, the applicant did not make it to that meeting and it was rescheduled for October 28, 1992. Just before that meeting (it appears) the applicant was handed another termination letter, this one dated October 26, 1992. This letter is identical to the October 23, 1992 letter except that it contained an additional reason for termination as follows:

...

11) On Saturday, October 24, 1992 at 6:15 a.m., you were found sleeping at your desk by the Warehouse Manager. When awakened, you were asked to move your car from a non-authorized parking spot, and were told to punch out. You responded verbally "Fine" and left to move your vehicle.

When the Warehouse Manager returned to your office at 7:15 a.m. (now into overtime shift), you were asked if you had punched out. You responded "no" and were told by the Warehouse Manager to punch out immediately.

22. Prior to the October 28th meeting, the applicant handed Bartolotti a handwritten

response to Cott's reasons for termination which he and his father had prepared. The applicant had only a brief discussion with Bartolotti about the grievance, and there was no discussion at all about the applicant's handwritten response to Cott's allegations.

23. In the grievance meeting, the parties went through the allegations and the applicant's response point by point. Cott would not budge and the matter was not resolved. As the meeting wound up, Bartolotti said something to the effect of "so its going to arbitration", to which Cott's representative responded "yes".

24. After the grievance meeting, Bartolotti said that he would arrange for a meeting with Local 938's counsel to discuss the grievance. Although the applicant interpreted this as an indication that his grievance was going arbitration, I am satisfied that Bartolotti's intention was to meet with counsel in order to obtain a legal opinion regarding the merits or proceeding to arbitration to support whatever decision he made in that respect, because he "knew", as he put it, that if the grievance did not go to arbitration, it was likely that the applicant would complain to the Board that he had not been represented fairly.

25. The meeting with counsel took place at Local 938's office. After they reviewed the matter, the applicant's impression was that counsel (who was not Local 938's counsel at the hearing) thought that Cott had not had cause to terminate him. However, I reject his assertion that counsel "said I had a good case and there would be no problems". It is highly unlikely that counsel would say that in the circumstances and having regard to her view of the matter as expressed in her subsequent opinion letter to Bartolotti. Nevertheless, the applicant left the meeting expecting that his grievance would go to arbitration.

26. A short time later Bartolotti received counsel's opinion letter. Upon reviewing it, he immediately decided, without any further discussion or consultation with anyone, that Local 938 would not take the applicant's discharge grievance to arbitration. Bartolotti testified that in making that decision, he considered counsel's opinion, which he understood to be that the applicant's case was weak, what had occurred at the grievance meeting with Cott and the meeting with counsel, his own assessment of the relative credibility of the applicant and the probable employer witnesses, and the cost of going to arbitration. Bartolotti said he knew that the applicant would disagree with his decision and probably complain that he had not been represented fairly, but that he felt his decision was the correct one in the circumstances.

27. Subsequently, in late November 1992, Bartolotti sent the applicant a letter advising him that Local 938 would not be taking the discharge grievance any further, together with a copy of the legal opinion he had received.

IV

28. Complaints that a trade union has breached the duty of fair representation imposed by section 69 of the Act often involve a refusal by the union either to file a grievance for the employee or, if a grievance was filed, a refusal to take it to arbitration. The duty of fair representation does not require a trade union to take a grievance to arbitration merely because the employee wants it to. Unless the collective agreement stipulates otherwise (and it does not in this case), the trade union has the authority and obligation to decide whether, upon a fair consideration of the relevant factors, a grievance will be filed or taken to arbitration. The fact that a grade union has refused to take a grievance to arbitration will not be itself constitute a breach of the duty of fair representation imposed by section 69. In *Canadian Merchant Service Guild v. G. Gagnon*, [1984] 1 SCR 509 at page 527, the Supreme Court of Canada had occasion to review the principles applicable to a trade union's duty of fair representation as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence without serious or major negligence, and without hostility towards the employee.

This is both a useful set of general guidelines against which a trade union's conduct can be measured, and reflects the Board's approach in fair representation cases (see, for example, *Marcia Robertson*, [1990] OLRB Rep. Aug. 886, *Balford Lindsay*, [1989] OLRB Rep. Mar. 264, *Don Roe et al.*, [1986] OLRB Rep. Oct. 1429, *Jeanne St. Pierre*, [1986] OLRB Rep. June 883, *Catherine Syme*, [1983] OLRB Rep. May 775).

29. The term "discriminatory" in section 69 has been interpreted broadly to include all cases in which a trade union distinguishes between or treats employees differently without good reason. Conduct motivated by hostility, ill-will or other improper considerations constitutes "bad faith" within the meaning of section 69. Conduct need not be either improperly motivated or discriminatory in order to be "arbitrary" within the meaning of section 69.

30. In order not to run afoul of section 69, a trade union must consider all relevant factors, and no irrelevant ones, in dealing with a grievance situation, or other employee concern relating to employment. The Board has found that this requires a trade union to make reasonable efforts to investigate a grievance so that all relevant factors can be considered in dealing with it. Collecting and evaluating information is a necessary preliminary step to engaging in a decision-making process which is consistent with the duty of fair representation (see, for example, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067 at paragraphs 38 and 39 and *Bujalski Włodzimierz (Walter)*, [1991] OLRB Rep. June 735 at paragraph 20).

31. In dealing with grievances of employees it represents, a trade union does have a kind of "right to be wrong", in the sense that honest mistakes, innocent misunderstandings, or errors in judgement will not of themselves generally constitute "arbitrary" conduct. It is not the Board's function to second-guess a trade union's decision. As a general matter, however, a trade union is responsible for the conduct of its employees, representatives or agents, since a trade union, like a corporation, can only act through such persons. In applications alleging a breach of the duty of fair representation, the Board is concerned with the nature and quality of a trade union's representation conduct. This concern extends to and includes a trade union's conduct in all representation matters, including its conduct in the settling of grievances.

32. Terms like "implausible", "so reckless as to be beyond worthy of protection", "unreasonable", "capricious", "grossly negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary within the meaning of section 69 (see, *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861, *ITE Industries*, [1980] OLRB Rep. July

1001, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *Seagram and Company Ltd.*, [1982] OLRB Rep. Oct. 1571, *Cryovac, a Division of W. R. Grace and Co. Ltd.*, [1983] OLRB Rep. June 886, *Smith & Stone, (1982) Inc.*, [1984] OLRB Rep. Nov. 1609, *Howard J. Howes*, [1987] OLRB Rep. Jan. 55, *George Xerri*, [1987] OLRB Rep. Mar. 444, among others). Such strong language may be apt in the more obvious cases but does not accurately describe the entire spectrum of conduct which could be considered to be arbitrary. As the Board's jurisprudence demonstrates, whether conduct is arbitrary will depend on the circumstances.

33. Where, as in this case, an unfair representation complaint relates in whole or in part to the manner in which a trade union has dealt with a grievance, the Board generally does not sit as an arbitrator of that grievance. However, it is inevitable that facts material to the grievance will also be relevant to an assessment of the trade union's conduct, and in some cases to an assessment of the appropriate remedy if a breach is found (*Kenneth Edward Homer*, [1993] OLRB Rep. May 433, *Marcia Robertson*, *supra*, *Gerald Lecuyar*, [1987] OLRB Rep. Jan. 72).

34. Also relevant to the Board's consideration an assessment of a trade union's conduct in an unfair representation proceeding are the importance of a grievance from the perspective of the complaining employee, the implications for other bargaining unit employees and the trade union, and the facts of the grievance and consideration given them by the trade union. Where, as in this case, the situation involves the termination of employment, the Board gives careful scrutiny to a union's decision not to pursue the discharge to arbitration, and where it is possible that some relief could have been obtained at arbitration, there is an onus on a trade union to explain why it decided not to arbitrate (*Kenneth Edward Homer*, *supra*, *Marcia Robertson*, *supra*, *Screenstage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Savage Shoes Ltd.*, *supra*, *Howard H. Howes*, *supra*). In assessing a trade union's conduct in such cases, the standard applied is an objective one.

V

35. In this case there is no evidence of the discriminatory conduct. The question is whether Local 938 acted arbitrarily or in bad faith.

36. The applicant's complaint herein centers on Local 938's conduct with respect to his grievances that his July 21, 1992 and October 26, 1992 discharges were unjustified. It is apparent that Local 938 could have done a better job in dealing with the first discharge. Bartolotti failed to inform the applicant of all the reasons for the July 21, 1992 discharge, failed to obtain relevant information from the applicant, and failed to advise the applicant and get his response to the information he obtained in the course of dealing with the grievance of the other employee involved, even though he used that information as the basis for agreeing to the substitution of a two-day suspension for the discharge in settlement of the applicant's grievance. On the other hand, it does not appear that the applicant raised any objection or concern at the time, either with respect to the admission of wrongdoing made on his behalf or otherwise. Further, the applicant was not particularly forthcoming with information either. Finally, on the evidence before the Board, I am satisfied that the settlement agreed to by Bartolotti was a reasonable one in the circumstances. In the result, the deficiencies in Local 938's handling of the July 21, 1992 discharge did not cause the applicant any labour relations harm. In these circumstances, I would not give the applicant any remedy with respect to this aspect of his complaint and I therefore find it inappropriate to declare that Local 938 failed to represent him fairly in that respect.

37. Local 938's conduct with respect to the applicant's October 1992 discharge grievance raises greater concerns.

38. The legal opinion Local 938 obtained from its counsel, and upon which Bartolotti relied, reads as follows:

"You have asked for my opinion regarding the discharge of Bill Hill Jr. which occurred on October 26, 1992. For the reasons to be outlined below, it is my opinion that there are some serious difficulties in proceeding with this case to arbitration.

The facts as I understand them are as follows. Mr. Hill Jr. started with Cott Beverages on April 29, 1991. In February 1992, Mr. Hill Jr. posted for a position as Shipper/Receiver. He was given the position, but only after he had grieved the company's attempt to fill the position with an employee who had not even applied for the job. Mr. Hill Jr. indicated in his application that he was knowledgeable in all areas of shipping/receiving and with all of the documents used in that area.

The grievor's prior disciplinary record is a 2-day suspension for leaving his work post on July 11 [sic], 1992 without permission. This had originally been a termination but was reduced during the grievance procedure.

The employer bases the termination of the grievor upon a review of his entire record from June 1, 1992 and cites a great number of instances of mathematical mistakes, errors, omissions, improper processing of paperwork, all of which the employer claims were brought to the attention of the grievor by verbal counselling from the warehouse supervisor and warehouse manager. Furthermore, the employer cites instances of the grievor parking his car in an unauthorized parking area and having to be repeatedly told to move his car as well as being verbally warned by the warehouse supervisor for having been found sleeping at his work station.

The incident which precipitated the discharge occurred on October 24, 1992, wherein the grievor was again found asleep at his desk. As well, the grievor had again parked his car in the unauthorized parking area. He was apparently told to move his car and punch out. The grievor moved his car, but did not punch out until he was again told to do so an hour later.

The major difficulty with this case is the number of instances of mistakes and disregard for instructions that the employer has documented. The grievor has indicated that he did not receive some of the memos that are indicated in the letter of termination. There is also the observation by Mr. Kurrat of the grievor reading obscene literature at his work station, which Mr. Kurrat agrees he did not talk to the grievor about at the time. The grievor claims that he did not receive the repeated verbal counselling as stated in the letter, but instead had been told to try to improve and that he had been told he was improving on the mistakes. The grievor claims that the only time he slept in the plant he had received permission from the warehouse supervisor to do so. The warehouse supervisor denies ever giving such permission. The grievor claims that on October 24 he was not asleep at his desk but rather he had put his head on his arms because he had a headache. The warehouse manager will apparently testify that when Mr. Hill Jr. lifted his head after repeated calling of his name, he appeared as someone just awaking from a sleep. The grievor also denies that he was told to punch out when he was told to move his car.

This case will very much revolve around the credibility of the witnesses. The employer will no doubt have the warehouse supervisor and the warehouse manager testify as to their counselling and various observations. They will probably be very clear as to what they stated to the grievor and especially as to what they observed on various occasions. The employer will also be able to produce various documents showing the various mistakes the grievor has made to bolster their contention of his unacceptable work.

The credibility problem that the grievor has is that he is doing things that he has been repeatedly told not to do. Unfortunately, it would be very difficult to get an arbitrator to believe that the grievor had actually gotten permission to do the various things he claims he had gotten permission for, when the supervisors are going to categorically state that they never gave any such permission. Also, it is difficult to argue that the grievor was so busy that he had no time to check paperwork when the grievor had time to move his car, time to read non-work books, and fall asleep.

Although discharge is a harsh penalty in light of the prior disciplinary record, arbitrators would be more likely than not to allow in all of the incidents related in the discharge letter and rely on those as building a case of poor work performance. This general performance problem is culminated by the sleeping incident of October 24, 1992. As well, the grievor does not have a long service record with the company, and arguably has not demonstrated a good grasp of the shipper/receiver position which he has only filled since February 1992.

Given the above, this case presents a number of problems at arbitration, not the least of which is the credibility of the grievor versus that of the two company managers in respect of the grievor's work performance. The short length of service as well as the denial by the company that certain permissions were given to the grievor all decrease the chances of success. I would, of course, be prepared to argue this matter should you decide to proceed further with it.

I trust this information will assist you in your consideration of this matter. If you have any questions or problems, please do not hesitate to call me."

39. In my respectful opinion, there is nothing wrong with this legal opinion as far as it goes. However, like all legal opinions, this one is only as good as the information upon which it is based. Since counsel who prepared this grievance did not testify or otherwise appear before the Board in this proceeding, I have only the evidence of the applicant and Bartolotti, and the opinion itself before me.

40. The applicant denied that he had received "repeated" counselling with respect to his work performance, that he did anything wrong in parking his car where he did, that he had been given a verbal warning for sleeping at his workstation, and all the allegations in point #9 in the discharge letters. The applicant conceded that he had made errors at work, but denied that his errors were any greater in number or more serious than those made by other employees. Finally, the applicant denied that he was sleeping on the job on October 24, 1992, or that he failed to follow Kurrat's instructions, as alleged by Cott.

41. More importantly for purposes of this application, however, Bartolotti conceded that the July 21, 1992 suspension was the applicant's only "formally recorded" discipline, that the applicant probably made no more errors than anyone else in his department, that the applicant's department was a mismanaged mess at the material times, and that he did not believe Cott when the company indicated it had witnesses to the culminating incidents on October 24, 1992 other than Kurrat. Bartolotti was entitled to consider and rely upon the legal opinion he obtained in this case. A trade union is entitled to seek legal advice with respect to a grievance, or whether or not a grievance can or should be pursued to arbitration. However, a legal opinion obtained for such purposes is only advice and it is the trade union's responsibility to decide whether or not to file a grievance, or pursue it to arbitration. A trade union cannot abdicate that responsibility by deferring to a legal opinion or other advice without making its own assessment of the relevant circumstances, and the legal or other advice in light of those circumstances. Indeed, that is what Bartolotti did in this case.

42. The legal opinion upon which Bartolotti says he relied does not say that counsel's view was that the applicant's discharge grievance had no reasonable chance of success at arbitration. Even with all the problems with the grievance identified by counsel, she still concludes that "discharge is a harsh penalty in light of the prior discipline record." Notwithstanding this conclusion, however, counsel does not go on to specifically say whether she has considered whether an arbitrator might be persuaded to substitute a lesser penalty for the discharge even if some discipline was warranted, although her reference to the applicant's seniority suggests that she may have considered it.

43. Nowhere in counsel's letter is there any mention of how the applicant's work perfor-

mance measured up against that of others in his department. As I have already indicated, Bartolotti knew that the applicant's mistakes had been neither more numerous nor more serious than those of his co-workers, and also that the whole department was functioning poorly at the time. In my view, facts such as these would be material to a proper consideration of the merits of the applicant's discharge grievance, particularly whether a substituted penalty might be obtained. The detailed nature of counsel's letter suggests that it is unlikely that she simply omitted to recite these considerations, or that she considered them unimportant. I find it more likely that she was never told then. Although the applicant could have offered this information, neither his failure to do so, nor any oversight by counsel in interviewing the applicant, excuses Bartolotti's omission to disclose this information. In light of counsel's conclusions without these facts, it seems likely that she would have been more optimistic in her assessment of the grievance's chances of success to arbitration, even if that success was obtaining a lesser substituted penalty.

44. Further, even Bartolotti did not say that he interpreted counsel's letter as advising that the applicant's grievance had no reasonable chance of success at arbitration. Having failed to ensure that all of the relevant information had been supplied to counsel, Bartolotti then went on to fail to properly consider the legal advice he received in light of his own knowledge of the workplace in that respect (namely, that the applicant made no more errors than anyone else and that his whole department was in disarray), and failed to give adequate or any real consideration to the possibility of obtaining a lesser substituted penalty for the applicant. This, combined with a lack of a satisfactory explanation for his assessment of the applicant's relative credibility, suggests that Bartolotti failed to give proper consideration to the relevant factors and took irrelevant factors into account in deciding not to take the applicant's grievance to arbitration. Further, on the evidence before the Board and having regard to the nature of the grievance, I am satisfied that Local 938's decision not to pursue the grievance further was not a reasonable one.

VI

45. In a result, I am satisfied that Local 938's decision not to take the applicant's October 19, 1992 discharge grievance to arbitration was arbitrary and in bad faith, contrary to section 69 of the *Labour Relations Act*. I therefore declare that Local 938 has breached section 69 of the Act.

VII

46. This brings me to the question of remedy. In his application, the applicant requested that "91-Sub 4 - Sub C" [sic]. Section 91(4)(c) provides that:

91.- (4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

• • •

- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or

I take it from the applicant's reference to this provision that he was requesting that the Board either reinstate him to his employment with Cott or award damages. Since the applicant did not name Cott as a responding or interested party, it appears that he was interested in damages rather than a reinstatement. Further, although Local 938 identified Cott as an interested party and the Board gave Cott notice of these proceedings as a result, the company filed nothing and did not participate in the proceeding.

47. At the hearing, the applicant, through counsel, indicated for the first time that he was seeking the relief which is usually sought in section 69 proceedings, and commonly granted when the Board finds that a trade union has breached section 69; namely, that Local 938 be directed to take the grievance to arbitration.

48. In this case, it is not at all clear that the Board can or should direct that the grievance go to arbitration. Such an order would affect Cott, which was not named as a party, does not appear to have been given sufficient notice that it might be affected by the proceeding, and which did not participate in the proceeding. If such a remedy can and should be granted, it is not clear what directions, if any, should be given regarding a responsibility for its carriage, the associated costs, or how any potential liability should be apportioned in the circumstances, including the applicant's delay in proceeding with the matter.

49. Accordingly, I do not find it appropriate to award the applicant any relief at this time. Instead I would remit the question of remedy to the parties and Cott to resolve if they can. I will remain seized with respect to the issue of remedy for a period of six months.

50. The Registrar is directed to send a copy of this decision to Cott as well as to the parties. The Registrar is also directed to schedule a hearing to deal with the issue of remedy upon the written request of any of the applicant, Local 938 or Cott. If no party requests a hearing within six months from the date hereof, the Board will consider the issue of remedy to have been resolved and this proceeding will be finally terminated.

1141-94-R International Alliance of the Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461, Applicant v. Cineplex Odeon Corporation and/or 796278 Ontario Limited and/or Kingsbridge Theatre on the Square (Niagara) Inc., Responding Parties

Sale of a Business - Movie theatre purchased by non-profit group and converted into live theatre - Movie theatres's projectionists represented by IATSE - Live theatre employing no projectionists - Board concluding that vendor and purchaser engaged in different businesses, and that purchaser not acquiring "part of the business" within meaning of section 64 of the Act - IATSE's sale of a business application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair.

APPEARANCES: *Bernard Fishbein, Walter Lipscombe and Andrew Mestern* for the applicant; no one appearing for Cineplex Odeon Corporation and/or 796278 Ontario Limited; *Robert B. Reid and Anthony Gudgin* for Kingsbridge Theatre on the Square (Niagara) Inc.

DECISION OF THE BOARD; January 31, 1995

1. This is an application under section 64 of the *Labour Relations Act*. The applicant I.A.T.S.E. Local 461 alleges that the respondent Kingsbridge Theatre on the Square (Niagara) Inc. ("Kingsbridge") purchased a part of the business of Cineplex Odeon Corporation ("Cineplex") when it acquired from a Cineplex subsidiary, 796278 Ontario Limited, (the "numbered company"), the building and premises known as the Seneca Theatre in Niagara Falls.
2. The applicant has represented projectionists employed at the Seneca Theatre by Cineplex and its predecessors for more than fifty years. These bargaining rights are contained in a collective agreement which covers the Seneca and other theatres in the St. Catharine's area. Pursuant to its most recent agreement with Cineplex, I.A.T.S.E has the right to supply, and Cineplex has the obligation to employ, any and all projectionists and stagehands required at theatres covered by the agreement.
3. Kingsbridge is a non-profit charitable corporation which has operated as a community theatre in Niagara Falls since 1985. Its activities are governed by a volunteer Board of Directors and its productions are carried out with the assistance of volunteer labour.
4. On June 24, 1994, Kingsbridge purchased the Seneca Theatre at a cost of \$150,000.00. Immediately thereafter, Kingsbridge undertook renovations to the theatre at a further cost of \$275,000.00. These renovations were both cosmetic (e.g., carpeting and redecorating) and structural (e.g., removing seats and expanding the existing stage). Although there was some dispute on the evidence as to the extent of the renovations necessary to enable the Seneca to be used for live theatre, it would appear that with relatively minimal renovations the theatre could have been used to accommodate some basic performances but more substantial productions required the kind of renovations undertaken by Kingsbridge. Initially, Kingsbridge had contemplated erecting a new theatre on land which it had already purchased, but the projected cost of 3.4 million dollars was deemed prohibitive.
5. As part of the agreement of purchase and sale with the numbered company, Kingsbridge is prohibited from showing motion pictures at the Seneca for a period of ten years. It was agreed, however, that Kingsbridge has no expectation of operating the Seneca as a cinema and does not anticipate receiving any clientele by virtue of the Seneca having previously been operated by Cineplex. The single projectionist employed at the Seneca was laid off prior to the sale, the screen and sound system were subsequently removed and the projection equipment will be sold or otherwise disposed of. The former projectionist is now on the union's relief referral list.
6. Finally, the parties also agreed that the Seneca has never been used for live theatre. Its principle, if not exclusive, use over the years appears to have been as a cinema.
7. On the basis of these facts, I am of the view that there has been no sale of a business within the meaning of section 64 of the *Labour Relations Act*. This provision states in part:

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

“successor employer” means an employer to whom the predecessor employer sells the business.
 (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

• • •

(5) An interested person, trade union or council of trade unions may apply to the Board within sixty days after the predecessor employer sells the business for the termination of the bargaining rights of the trade union referred to in subsection (3).

(5.1) On an application under subsection (5), the Board may terminate the bargaining rights of the trade union only if it considers that the successor employer has changed the character of the business so that it is substantially different from the business of the predecessor employer.

• • •

8. As noted by counsel for the respondent, the facts of this case are essentially indistinguishable from those in *The Corporation of the City of Brantford*, [1988] OLRB Rep. July 648, in which the Board found that the transfer of a cinema from Famous Players Limited to the City of Brantford and its subsequent conversion to use as a live theatre did not amount to a sale of business within the meaning of section 64. It was the view of the Board in that case, and it is my view here, that the vendor and purchaser were engaged in two different businesses - the exhibition of motion pictures and the performance of live theatre, respectively - and that what was acquired by the purchaser was an asset of the vendor's business, but not a “part of the business” within the meaning of section 64.

9. In *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. Apr. 281, a case relied on by the applicant, the Board reviewed the cases in which a sale of part of a business has been found, before summarizing:

66. In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable “part” of its economic organization - managerial, or employee skills, plant, equipment, know-how, or goodwill - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This “new” economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them were preserved. The “part” of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.

67. In all of these cases, there was a transfer of a distinct part of the predecessor's configuration of assets or capacity to carry on business, and no material change in the character of the work performed by the employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, and the skills of the employees; and, but for section 64, the established bargaining and collective bargaining rights would have been lost. This was the mischief to which section 64 is directed, and the Board was satisfied on the evidence in each of these cases that it should be applied.

10. Employing the analysis set out in *Accomodex*, it is questionable whether the Seneca Theatre constituted “a distinct part of [Cineplex's] configuration of assets”. Cineplex and the numbered company did not participate in the proceedings, and the constituent elements of the Cineplex business were not identified. I note, however, that there was no disposition of any logos, trademarks, customer lists, accounts receivable, contracts, employees, licenses or other assets that might form part of the Cineplex business. Kingsbridge acquired no “goodwill” from Cineplex and does not anticipate receiving any customers by virtue of the former operation of the Seneca by Cineplex.

11. More importantly, however, there appears to have been no “continuation of the work performed, the essential attributes of the employment relationship and the skills of employees”. The only work in relation to which the Board heard evidence was that of projectionists. Not only has this work been discontinued, but there is no likelihood that it will ever be performed by Kingsbridge. Further, the work in relation to which the union now seeks to assert its bargaining rights, that of stagehands, appears never to have been performed by Cineplex or its predecessors at the Seneca and only to an extremely limited extent by Cineplex elsewhere. (There was some suggestion in the applicant’s opening statement that Cineplex had used stagehands supplied under the agreement to undertake certain renovations necessary for other cinemas to be marketed for speaking engagements, but such work appears to have been exceptional in nature and limited in duration.)

12. In my view, these facts demonstrate that Kingsbridge has not continued any part of the Cineplex business.

13. In coming to this conclusion, I was not persuaded by the applicant’s argument that the real issue was whether there has been a substantial change in the character of the business within the meaning of section 64(5). Section 64(5) only applies where the threshold requirements of section 64(1.1) have been met. For the reasons given above, that is not the case here. Similarly, the fact that the collective agreement makes provision for stage work and that such work could have been performed, to some extent, in the unrenovated facility, are not sufficient in themselves to support a finding of a sale of a business. The existence of a scope clause that can accommodate the kind of work in which a purchaser is engaged and the capacity for some such work to have been performed in the transferred facility are factors to be considered by the Board in determining the application of section 64, but they are not conclusive of that issue. In this case, as in the *City of Brantford*, these considerations are more than offset by the fact that such work appears never to have been performed at the Seneca or, to any real extent, at other cinemas covered by the Cineplex collective agreement.

14. For all of these reasons, the application is dismissed.

1902-94-U United Steelworkers of America, Applicant v. Nelson Quarry Company, Responding Party

Dependent Contractor - Lock-Out - Strike - Strike Replacement Workers - Unfair Labour Practice - Union representing bargaining unit of dependent contractors engaged in delivery of crushed stone - Quarry employer locking out bargaining unit and subsequently using services of independent brokers to pick up stone from quarry - Employer maintaining that work performed by independent brokers different than work performed by bargaining unit drivers - Union’s complaint that employer violating strike replacement provisions allowed in part and dismissed in part - Board inviting parties’ written submissions regarding appropriate remedy

BEFORE: S. Liang, Vice-Chair.

APPEARANCES: M. Lewis and Emilio Campea for the applicant; Robert Statton and Graeme Goodchild for the responding party.

DECISION OF THE BOARD; January 3, 1995

1. This is an application made pursuant to the provisions of section 91 of the *Labour Relations Act*, alleging a violation of the provisions of section 73.1 (“the replacement worker provisions”).
2. This application was filed on August 30, 1994 and between September 6 and October 27, there were twelve days of hearing in which the Board dealt with a number of preliminary matters such as documents production, and heard the evidence and representations of the parties. During the course of the proceedings, the Board made a number of rulings which have been reduced to written decisions dated September 13, 21, 27 and 28.

Introduction

3. This employer (“Nelson Quarry”) is one of a number of operating companies controlled by Nelson Aggregate Co. Nelson Quarry consists of a limestone quarry located in Burlington and an asphalt manufacturing plant at the same location. The bargaining unit represented by the applicant (also called “the Steelworkers” or “the union” herein) consists of dependent contractors engaged generally in the delivery of crushed stone (also referred to as “aggregate”) for Nelson Quarry. As of March, 1994, there were 11 persons in the bargaining unit. Nine of these persons owned and operated a tandem axle vehicle. One person owned a single axle vehicle, and one person a tractor trailer.
4. There are essentially three ways in which stone is shipped out of Nelson Quarry. First, the company may engage one of the dependent contractors to deliver stone. Second, the company may engage one of a number of independent trucking brokers to deliver stone. All the independent brokers use tractor trailers for delivery. Third, the purchaser of the stone may pick up its material from the quarry.
5. The union and the employer were parties to a collective agreement which expired on or about February 10, 1994. On February 17, the parties received a “no-Board” report from the Minister of Labour. On March 7, the union gave written notice that it would commence a strike on that date. On the same date, the employer informed the union that it had locked out the members of the bargaining unit, also effective March 7.
6. The strike/lockout continues to this day. From March 7 to about August 3, the company significantly reduced its operations. Very few trucks entered or left the quarry. On or about July 26, the company filed an application to restrain picketing before the Board. The application was scheduled to be heard on August 2, and as a result of the parties’ appearance on that date, the matter was adjourned to August 16. The application was ultimately withdrawn with leave of the Board on August 17.
7. Apparently as a result of the events of August 2, the company decided to re-commence its operations on August 3, using the services of independent brokers to deliver its stone. Customers of Nelson Quarry also continue to pick up stone from the quarry.
8. The union alleges that the independent brokers hired by Nelson Quarry are performing work which was ordinarily done by the dependent contractors within its bargaining unit. It is the position of the union that the work of the employees in the bargaining unit for the purposes of section 73.1 was the delivery of stone. This work continues to be performed during the strike/lockout, in violation of section 73.1.

9. The employer takes the position, among other things, that to the extent that the work of all but one of the persons in the bargaining unit consisted of the delivery of stone by single axle or tandem axle vehicles, it has not made any deliveries since the commencement of the strike/lockout using such vehicles. All of the independent brokers engaged by the company use tractor trailers. Further, the sole member of the bargaining unit who drove a tractor trailer, Wilfred Bester, resigned from his haulage relationship with Nelson Quarry on June 27, 1994. Therefore, as of the time of this application, there was no work in the bargaining unit for the purposes of section 73.1 which consisted of delivery of stone by tractor trailer.

10. On the first day of hearing, the employer and the Communications, Energy and Paperworkers Union of Canada, Local Union No. 494 ("the CEP") brought to the Board's attention applications made jointly by them under sections 91 and 11.1 of the Act (Board File Nos. 1960-94-U and 1961-94-M). The employer and the CEP requested that the Board consolidate the hearing of its two applications with the hearing of this matter. This was opposed by the union. After considering the submissions of the parties, I ruled that I would not consolidate Board File Nos. 1960-94-U and 1961-94-M with the present one.

11. Section 11.1 of the Act concerns, among other things, the right of access for the purpose of picketing to property which has a "quasi-public" nature. This section also provides the Board with the power to impose restrictions on the exercise of this right to prevent undue disruption to the operations of an applicant. Assuming that section 11.1 applies to the premises of Nelson Quarry, and assuming that the CEP is a party which may bring an application under section 11.1, it was not apparent at all from the materials submitted by the employer and by the CEP that they allege that the picketing activities of the union's members were causing any disruption to their operations. It is also not apparent in what way these parties allege that the union has violated the Act, in the section 91 complaint.

12. This assessment of the materials filed was confirmed by the representations of counsel for the company who indicated that the purpose of filing both applications was to ask the Board's directions with respect to the limits of its lawful activities during the strike/lockout. Counsel indicated that the company wished a decision from the Board providing general guidelines on who is lawfully permitted to deliver aggregate during the strike/lockout, beyond the matters specifically set out in the union's application.

13. It is not apparent to me that the applications made under 11.1 and 91 of the Act will involve the Board in providing general guidelines as to the limits of section 73.1. I certainly see no necessary link between the facts which would support an application under section 11.1, allegations that the union has violated sections 71, 73, 74 and 76 of the Act, and the current application. Further, it appeared to me that the issue of the application of the replacement worker provisions of the Act to the employer's operations during this strike/lockout is precisely what is before me in the present application. Therefore, my decision on this application will provide the company, to the extent of the scope of this complaint, the guidance it seeks.

14. I therefore adjourned Board File Nos. 1960-94-U and 1961-94-M, pending the determination of the current application.

15. Upon receiving my ruling declining to consolidate these various matters, the CEP indicated that it was not requesting status to intervene in the application before me.

16. The company returned to the theme of "general guidelines" at other stages of this hear-

ing. In its application, the union makes no allegation that customer pick-ups of stone (referred to in the industry as “FOB”) violate section 73.1. In counsel for the union’s opening statement, it was stated clearly that the shipment of stone by Nelson’s customers was not in dispute in this application. Counsel for the union stated for the record that there may be circumstances where customer pick-ups violate section 73.1; however, it was not making such an argument in the present application. During the course of the company’s case, counsel for the company sought to file as evidence a large number of documents relating to FOB deliveries. During the course of extended argument as to their relevance, counsel for the company asked the Board to make an interim order that FOB deliveries do not constitute unlawful replacement work.

17. I ruled that I did not intend to hear or receive evidence which does not relate to issues forming part of the current application. Further, I did not intend to make rulings on issues which are not part of this application. In the absence of a complaint by the union that the use of FOB deliveries violates the replacement worker provisions, this issue was not before me. To the extent that the union resists the company’s attempt to expand the focus of this application, without giving up the possibility that it may complain about these matters at a later date, this is a fact that may be taken into account by the Board in considering any future complaint by the union on these same issues.

18. Again, in final argument, counsel for the company requested that I declare that FOB deliveries do not violate the replacement worker provisions of the Act. Again, I indicated that this issue was not before me.

19. I make the general observation that the company seems to hold a misconception of the role of the Board in applying the provisions of the Act, and in particular, the provisions of section 73.1. Section 73.1 is, like sections 65 to 71 and 73, complaint-based. That is, it sets out certain prohibitions which may form the subject of an unfair labour practice complaint. The Board’s authority to apply and interpret these provisions arises when there is a complaint that these prohibitions have been violated. In the absence of a complaint, the Board does not inquire into facts simply because a party wishes to have the Board’s advice about whether or not the Act has been violated.

The Evidence

20. The Board heard the evidence of fifteen witnesses during the course of the hearing. It is unnecessary to provide all the details of each witness’ evidence. The Board also received a voluminous amount of documentary material from the parties, consisting of invoices, haulage reports and other material. Ultimately, much of the evidence was not in dispute. To the extent that there were conflicts in the evidence, it is unnecessary for the most part for me to resolve them for the purposes of this decision.

21. In his final submissions, counsel for the company made extravagant claims regarding the credibility of the union and its witnesses. Counsel submitted, in the case of one witness, for instance, that he and the union had “duped” the Board. Counsel also made claims that the union was acting in bad faith in bringing this application, that it was proffering half-truths to the Board, and other similar accusations. I am satisfied that there is not a shred of evidence to support any of these accusations. There is nothing before me to suggest that the union was acting in anything but good faith in bringing this application, or was deliberately misstating any fact to me. Further, the witnesses testifying on behalf of the union were candid, thoughtful and responsive to the questions asked.

22. Much of the evidence focused on three general themes: evidence concerning the way in which customers of Nelson Quarry order stone and how customers’ orders relate to the type of

truck used in its delivery; evidence comparing the activity of Nelson Quarry before and during the strike/lockout; evidence concerning the work performed by members of the bargaining unit prior to the strike/lockout and the way in which work was assigned. In comparing the activities of Nelson Quarry before and during the strike/lockout, the parties relied on various company documents showing sales and deliveries which enabled a comparison between the two periods of time. As well, there was also evidence regarding specific transactions with specific customers. As outlined in my decision of September 21 in this application, the parties agreed that to the extent that their case is based on the details of specific transactions, they would present the evidence based on a representative group of customers.

23. The customers of Nelson include construction contractors, cement plants, and individual homeowners. When a customer contacts Nelson to inquire about a price for its product, the price that Nelson's sales staff normally quotes is a price for delivered product. In other words, it is a global price which includes a component for the shipping costs, and a component for material. The component reflecting shipping costs is fixed by the amount that Nelson pays the brokers (a term which I use to mean both the dependent and independent contractors) for delivery. The sales staff have some flexibility in the materials component. At the time of this transaction, a customer may specifically request pricing for delivery by several different types of vehicles. In other cases, a customer may request a price for delivery by a specific type of vehicle only. In other cases, there may be no discussion about the type of vehicle, because it will be fixed by the amount of material that the customer wishes to order. For example, if a customer wants to buy only 9 tonnes of stone, it will be provided with a price that includes delivery by single axle truck.

24. Single axle trucks carry a load of about ten tonnes. Tandem trucks carry a load of about eighteen tonnes, and tractor trailers a load of about thirty-four to thirty-eight tonnes. The maximum load that any specific vehicle can carry is fixed for that vehicle and may vary a few tonnes from another like vehicle.

25. The amount which Nelson pays to truckers for delivery is expressed as an amount per tonne of material. The amount varies by the geographical zone to which the delivery is made. The amount paid for delivery also varies according to the type of vehicle used. It is highest per tonne for deliveries by single axle trucks, and lowest for delivery by tractor trailer. Deliveries by tandem axle trucks fall in the middle.

26. The most recent collective agreement between the union and the employer has schedules of rates for delivery by single axle, tandem axle and tractor trailers, per tonne of material. The dependent contractors covered by this agreement own and drive their own trucks, and are responsible for insurance and licensing fees. As indicated above, as of March, 1994, one person in the bargaining unit owned and drove a single axle truck, nine persons owned and drove tandem trucks, and one person owned and operated a tractor trailer. Some members of the bargaining unit have been delivering stone for Nelson Quarry and its predecessor companies as long as twenty to thirty years. It was revealed in the evidence that the sole person in the bargaining unit driving a tractor trailer, Wilfred Bester, has not been paid for his deliveries at the collective agreement rate for some number of years. Instead, he has been paid by the company the same rates that it pays its independent brokers. It is unnecessary to determine (it is disputed), whether this arrangement was entered into with the agreement or knowledge of the union.

27. As a matter of simple arithmetic, it is clear that it is more expensive to ship an equivalent amount of stone by single axle or tandem axle trucks, than by tractor trailers. Further, it would take a single axle or tandem axle truck two or three times the number of trips to carry the same amount of stone that can be carried in one tractor trailer delivery. Single axle trucks and tan-

dem axle trucks have certain advantages over tractor trailers, however. They are more manoeuvrable, less bulky, and can drop their deliveries if needed in a number of shallow piles instead of one large pile.

28. It is fair to conclude from the evidence that if a customer requires a sufficient quantity of stone and wishes it delivered to a site where accessibility is not a problem, it generally chooses to have the delivery made by tractor trailer, which is the cheapest method. It is also fair to conclude that customers would be generally indifferent if Nelson decided to make a given delivery using tandem trucks instead of tractor trailers, so long as the agreed price for delivered material was maintained. This, however, is unlikely to occur, for the simple reason that it would be uneconomic for Nelson to use a method of delivery which requires it to pay shipping costs higher than those it can recover from its customer.

29. There are also times when despite the higher shipping costs, a customer prefers to have material delivered by tandem trucks instead of trailers. Reasons for this include limitations on site accessibility by tractor trailer, the need to use a vehicle that can make a number of small drops, and the amount of material needed.

30. The evidence is that even before the beginning of the strike/lockout, the company had ceased to accept orders for or offer deliveries of material to its customers by either single axle trucks or tandem trucks. This decision was made in December of 1993 and became effective as of January, 1994. This resulted in grievances by the union, which were referred to arbitration. On June 27, 1994, the arbitrator found on the basis of undisputed facts and the evidence called by the union (the employer called no evidence) that:

16. Those facts support a rebuttable inference that the employer withheld from the single axle and tandem truck drivers aggregate loads which they would have made in the ordinary course of the employer's business and that those loads were made by trucks not driven and owned by the bargaining unit drivers, while bargaining unit drivers were either present at the quarry with their vehicles or would have been available to perform the deliveries within the time limits of clause 12.02. Absent evidence to the contrary, I so find. In the result, on and after December 27, 1993 to and including February 10, 1994, the employer has denied the single axle and tandem truck drivers the opportunity to earn the haulage rates set out in the collective agreement and, in so doing, has violated the agreement, including in particular clause 12.02.

31. It is useful to set out some of the provisions of the collective agreement, including the provision found to have been violated by the company:

ARTICLE 11 - SCOPE

2.01 This Agreement shall apply to all dependent contractors working at or out of Nelson Quarry Company's quarry at Burlington, Ontario, save and except foremen and persons above the rank of foreman, dispatcher, office and sales staff, security guards and watchmen and persons covered by the certification in Board File No. 2273-83-R

ARTICLE 111 - RECOGNITION

3.01 The Company recognizes the Union as the sole and exclusive bargaining agent for all dependent contractors of the Company in the bargaining unit above defined.

ARTICLE IV - MANAGEMENT RIGHTS

4.01 The Union agrees that it is the exclusive function of the Company:

(a) to conduct its business in all respects in accordance with its commitments and responsibilities, including the right to manage the jobs, relocate, extend, curtail or cease operations, to use brokers, to determine the number of men and vehicles required at any or all operations, to determine the equipment to be used and the schedules of shipment and productions, to judge the qualifications of the dependent contractors, and to maintain order, discipline and efficiency.

...

- 12.02 The Company shall not contract out to brokers any single axle or tandem deliveries to its customers if such deliveries can be performed by members of the bargaining unit within two (2) hours of the Company's request.

32. Despite the arbitration decision of June 27, the onset of the strike/lockout effectively meant that the bargaining unit members have never resumed doing deliveries for Nelson. As outlined above, all of the company's operations had in any event been significantly reduced as of March 7. However, on August 3, the company decided to resume its operations. On August 4, Graeme Goodchild, the Operations Manager for Nelson Aggregate Co., including Nelson Quarry, sent the following memorandum to the company's sales and dispatch staff:

We have a Legal Strike by Tandem and Single Axle Owner Operators.

Bill 40 restricts us from doing any Tandem or Single Axle Work or from doing their work with any other trucks.

Bill 40 concerns Replacement Workers.

NOTE:

DO NOT offer Trailers instead of Tandems or Single Axles

This could be deemed as Replacing Workers.

33. The company's sales staff who testified stated that since August 4, they have been complying with the instructions in the memorandum. Where a customer contacts Nelson Quarry and requests delivery of material by tandem truck or single axle truck, in their evidence, the customer is told that the company cannot supply such material.

34. As indicated above, one member of the bargaining unit, Mr. Bester drives a tractor trailer and not a tandem or single axle vehicle. There is no evidence that the company has instructed its staff to turn down any orders for material to be delivered by tractor trailer, and no evidence that this has ever been done since the beginning of the strike/lockout. In other words, there is no evidence of what, if anything, Nelson Quarry has done to avoid using prohibited replacement workers from performing work formerly performed by Wilfred Bester. No doubt, this is linked to the company's position in response to this application that as of June 27, 1994, upon Mr. Bester severing his haulage relationship with the company, the work of bargaining unit members for the purposes of section 73.1 no longer included delivery of material by tractor trailers.

35. I now turn to a general overview of the company's activities before and during the strike/lockout. Documents were introduced as exhibits which permit a comparison of the company's activities during the summer of 1993, and the summer of 1994. Since many of the company's customers are in the construction business, the middle months of the year are its busiest. The summaries which were compiled by the parties based on the information in these documents focused largely on August 1993 and August 1994. In August of 1993, the company sold a total of 50,729.24

tonnes of material which was picked up FOB. In the same month, it sold 29,655.62 tonnes of material for which it arranged delivery. In August of 1994, the company sold 29,689.10 tonnes of material which was picked up FOB, and in the same month, sold 17,438.09 tonnes of material for which it arranged delivery. In August of 1994, the company also shipped 10,142.00 tonnes of material to the Milliken Depot and Pinecrest Depot, both of which are operations of Nelson Aggregate Co. Therefore, in August of 1994, the company actually arranged for the delivery out of Nelson Quarry of about 27,580.09 tonnes of material. When the inter-company transfers of material to the Milliken and Pinecrest Depots are taken into account, the total amount delivered by Nelson in August of 1994 was about 93% of that delivered in August of 1993.

36. Comparing the activities of the independent brokers with the dependent brokers based on tonnes delivered, independent brokers delivered about 45 percent of the total tonnes delivered in May to August of 1993, and dependent brokers, about 55 percent. In the same period in 1994, of course, independent brokers accounted for 100 per cent of the tonnes delivered.

37. Another indicator of the activity of the company is the number of loads which leave the quarry. Between May 1, 1993 and August 31, 1993, independent brokers made about 32% (1924) of all deliveries and dependent brokers, about 68% (4109). In August of 1993, the company used nine different independent brokers to make 444 deliveries. In August of 1994, the company used eleven independent brokers to make a total of 732 deliveries.

38. It is evident from the above that the use by Nelson of independent brokers to deliver aggregate has increased markedly in 1994. Yet the amount of material delivered by Nelson remains almost the same during the strike/lockout as before the strike/lockout.

39. Turning to customer activity, consistent with the decision made by Nelson Quarry in December 1993, no deliveries have been made to customers by single axle and tandem truck since December 27. All of the customers on which I received evidence have received tractor trailer deliveries of material from Nelson in August of 1994. Many of these are past customers of Nelson. For some customers which have done business with Nelson in the past, the receipt of tractor trailers deliveries in August of 1994 is consistent with how these customers have had material delivered in 1993 (for instance, Eastdale Contracting Limited, B. D. International Interlock and Elmford Construction Co. Limited). However, there were also customers who consistently bought tandem loads of material in 1993, but in August of 1994 had material delivered by tractor trailer (for instance, Maiella Contracting Sewers & Watermain Ltd., Mueller Construction Co. Ltd. and Ministry of Natural Resources, Bronte Creek Provincial Park).

40. Some customers which have received deliveries of material by tandem trucks from Nelson in the past testified that they continue to require some aggregate to be delivered by tandem trucks for the purposes of their construction activities, and have gone to competitors of Nelson Quarry for such needs. One of these customers is Maiella. In May to August of 1993, Maiella received approximately 70 loads of aggregate delivered by tandem truck from Nelson Quarry. In the same period, there was only one delivery of material from Nelson Quarry by tractor trailer. In August of 1994 alone, there were thirty-two loads of material delivered to Maiella by tractor trailer from Nelson Quarry. The evidence of Gino Masciantonio, the president of Maiella, was that whereas he only used Nelson to supply some of its tractor trailer loads in 1993, in 1994, he decided to have Nelson supply all its tractor trailer deliveries. He also stated that, where possible, he prefers to have material delivered by tractor trailers, because of the cost. Most of the material which Maiella received from Nelson Quarry in August of 1994 by tractor trailer was delivered to a job site at the Ford Plant. Mr. Masciantonio testified that where trailers had access on this site, he pur-

chased material from Nelson Quarry. Where, for the same construction project, he required deliveries to be made by tandem vehicles, he ordered the stone from Milton Limestone.

41. A certain portion of the deliveries being made by Nelson Quarry during the strike/lockout consists of what the company describes as new accounts. For instance, one customer, Canada Building Materials ("CBM"), purchased material in the past from the Uhtoff Quarry, a Nelson Aggregate company, which was shipped by rail from Orillia. In 1993, CBM made the decision that the stone from that quarry did not meet its needs, and decided to obtain stone from Nelson Quarry instead. The contract for delivery of the material was negotiated some time in 1993, based on delivery by tractor trailer and the first deliveries were made in either July or November of that year.

42. As well, Nelson Quarry is now shipping significant quantities of stone to the Milliken and Pinecrest Depots owned by Nelson Aggregate Co. This resulted from a decision by Nelson Aggregate made in the fall of 1993 to cease using rail to ship stone. This meant that stone which was formerly shipped from Nelson Aggregate's Uhtoff Quarry by rail to these depots, is now supplied by Nelson Quarry. The evidence is unclear as to exactly when this change was implemented, though it appears that tractor trailer deliveries did not start until 1994. Prior to this, Nelson Quarry had not supplied stone in any significant amount to these depots.

43. I turn now to the evidence concerning the activities of the bargaining unit members and the independent brokers in 1993 and 1994, in addition to the general picture above. The evidence was that members of the bargaining unit generally arrive at Nelson Quarry from 5:15 to 6 a.m. each day. There is a building in which the truck drivers congregate, until they are called by the dispatch office through a speaker to be loaded for a delivery. The members of the bargaining unit may be called upon to deliver 5 to 10 loads per day. They work five days a week, from approximately 6 a.m. to 6 p.m. When a truck driver is requested to make a delivery, he is told what kind of material is to be loaded. The truck is driven to the yard where material is piled and sorted, and is loaded. Each truck is then weighed at the scale house. On the way out, the truck drivers stop at the dispatch office to pick up a delivery ticket indicating the name of the customer and place for delivery.

44. In addition to the members of the bargaining unit, independent brokers also arrive at Nelson Quarry early in the morning. The evidence of the union was that the drivers in the bargaining unit are the first to be loaded each day. This was disputed by the company, whose evidence was to the effect that no distinction was made as to whether the dependent contractors or the independent contractors were loaded first. It is unnecessary for me to resolve this conflict, for I am satisfied on both the oral and documentary evidence that before Nelson Quarry made its decision to cease using the tandem and single axle truck drivers to make deliveries, there was regular and steady work for the members of the bargaining unit. The evidence also shows that Wilfred Bester had steady work making deliveries with his tractor trailer, and that when the company needed a tractor trailer to make a delivery, it was first offered to Mr. Bester before the independent contractors.

45. The evidence of the bargaining unit members was that they delivered material for Nelson Quarry to a broad range of sites, including construction sites, customer yards, parking lots, and roadways. Geographically, they were called upon to deliver anywhere from London to Scarborough.

46. Bargaining unit members testified that no customer of Nelson Quarry with whom they

came into contact on a delivery has ever discussed a difference between the different types of vehicles available to make deliveries. Emilio Campea, a member of the bargaining unit and president of the local union, testified for instance that he has regularly delivered material to sites where tractor trailers are also being used to deliver material. He stated that he often sees Mr. Bester delivering material for Nelson to the same site as he does, on the same day. Although he understands that there are occasions when a tractor trailer is too bulky for a delivery site, he believes this is a rare occurrence.

47. It is the understanding of Mr. Campea that independent brokers are called upon to make deliveries when the dependent contractors are too busy. Independent brokers are engaged during the spring to fall months, but are rare in the winter months. In reviewing some of the deliveries which he made during 1993, he did not see any reason why a tractor trailer could not have had access to many of these sites.

48. My review of the documents shows that, at least with respect to August of 1993, it was very uncommon for Nelson to send both tractor trailers and tandem trucks to make deliveries to the same location. In some of the few instances where it did occur, the same material was delivered by both tractor trailers and tandem trucks within the month. In other instances, different material was delivered by different types of vehicles.

49. The documents indicate that the independent brokers which have been used by the company since it resumed shipping in August of 1994 have all been used, to a greater or lesser extent, by Nelson to make deliveries prior to 1994. One broker, Muscello Transport Ltd., is responsible for about half the material delivered out of Nelson Quarry in August of 1994. Muscello did not make any deliveries for Nelson Quarry in May to August of 1993. Most of the deliveries in August of 1994 were to the Milliken and Pinecrest Depots.

50. Before I leave the evidence, I note that during the course of the hearing, the company tried to introduce evidence concerning the conduct of the union's strike vote. I ruled that this evidence was not relevant. Since it is not disputed that the company has locked out the members of this bargaining unit, the requirements of section 73.1(2)1, 2 and 3 do not apply.

Argument

51. Counsel for the company states that the union has failed to establish, with respect to any of the representative companies, that the independent brokers were doing the work of the bargaining unit during the strike/lockout. A large portion, almost a third, of the material delivered in August of 1994, for example, consisted of "new" work (such as the Milliken and Pinecrest Depot deliveries, and the Canada Building Materials deliveries). It was work that the company had never done before; therefore, the bargaining unit members had never done this work.

52. Further, counsel states that the evidence establishes that the manner of delivery is directed by Nelson's customers. The only instances (apart from Wilfred Bester) when bargaining unit members delivered material were when customers specifically requested single axle or tandem loads.

53. The company relies on the "resignation" of Wilfred Bester in June of 1994. Counsel states that "you can't have a replacement worker if you don't have a worker". Upon his resigna-

tion, there were no tractor trailer drivers in the bargaining unit. This whole category of vehicle covered by the collective agreement has become a "void". There is no longer any member of the bargaining unit who can deliver by tractor trailer. Therefore, when Mr. Bester quit, the company was not prohibited from having his work done by someone else. Counsel further questions how, even if the bargaining unit includes a tractor trailer, the Board could direct the company to use one less independent broker during the strike/lockout.

54. Counsel also submits that the relevant time in determining bargaining unit work for the purposes of section 73.1 is the time of the application. As of the date of this application, there were nine tandem drivers and one single axle driver in the unit.

55. Counsel also relies on, among other things, Articles 4.01(a), 12.02 and 14.01 of the collective agreement. Article 12.02, it is submitted, limits the company with respect to the use of independent brokers to perform tandem and single axle deliveries, but makes no mention of any limitation with respect to tractor trailer deliveries.

56. Counsel also reviewed the documentary evidence and summaries concerning the company's activities. Excluding the deliveries made to the Pinecrest and Milliken Depots, the volume of materials delivered in August of 1994 is only 58.81 percent of what was delivered in August of 1993. He states that the deliveries to the depots must be excluded from any comparison made between 1993 and 1994, since these were new activities.

57. Finally, counsel reviewed some decisions of the Board applying section 73.1. In his submission, to the extent that the purpose of section 73.1 of the Act is to inhibit the company's ability to carry on work during the strike, the economic power of this union is derived from the company's inability to use tandem or single axle trucks to perform deliveries.

58. Counsel for the union states that this case rests on the prohibition in section 73.1 respecting the performance of certain "work", and how this "work" is defined both in the Act and in the cases. It is the position of the union that since August of 1994, independent brokers are performing the work of the bargaining unit. Not only has the company failed to discharge its onus and prove that they have not been doing so, but the evidence shows they are.

59. The Board has stated in its prior decisions that the concept of "work" in section 73.1 must be broadly defined. An employer cannot escape the effect of section 73.1, for instance, by having work done in a different manner than before the strike/lockout, if it achieves the same result. Further, "work" for the purposes of section 73.1 is not limited by the specific provisions of a collective agreement. A reading of a collective agreement may lead to a narrower definition of the entitlement to certain work by the members of the bargaining unit, than a reading of section 73.1.

60. On the facts of this case, the work of the employees in the bargaining is to deliver aggregate by truck. In two ways, the company has violated section 73.1. First, it has violated section 73.1 by having tractor trailers continuing to perform deliveries, where it is clear that the work of delivering stone by tractor trailer is work which was performed by a member of the bargaining unit. Second, it has violated section 73.1 because the company has transferred work that would have been performed by tandem trucks, to tractor trailers belonging to independent brokers.

61. With respect to the first, the evidence shows that amongst the representative companies, there are some for whom Mr. Bester delivered material during 1993, which have received material by tractor trailer during the strike/lockout.

62. Counsel characterizes as absurd the argument by the company that Mr. Bester's resig-

nation changed the nature of the bargaining unit work for the purposes of section 73.1. The only effective interpretation, it is urged, is to look at the work being performed at the time the strike/lockout commenced.

63. With respect to the second element of his argument, counsel states that the company has the onus to show that none of the deliveries made by tractor trailers in August of 1994 would have been done by tandem trucks, but for the strike/lockout. They have failed to discharge the onus. The Board should draw the inference that work has been transferred from tandem trucks to tractor trailers. It is simply not plausible to suggest that the sales staff of Nelson Quarry would refrain from ever suggesting to customers that they have their material delivered by tractor trailers instead of tandem trucks during the strike/lockout. The evidence is that the company's use of independent brokers has dramatically increased in 1994 as compared to 1993.

64. Counsel acknowledges that the issue of remedy is very difficult in this case. The union seeks as remedy the following:

- (a) an order that the union be entitled to monitor the activities of the sales and dispatch staff when they deal with Nelson Quarry customers. The union seeks in this regard an order similar to the one to which the parties consented in *Diamond Taxicab Association (Toronto) Limited and Associated Toronto Taxi-Cab Co-operative Limited*, decision dated August 29, 1994 (unreported).
- (b) an order that the company be prohibited from making any deliveries during the strike/lockout. The union accepts that prior to the lockout, independent brokers were engaged by Nelson to do deliveries. However, in this situation, it is not possible to establish exactly what work would have been performed by Mr. Bester as opposed to an independent broker. Since no particular block of work can be tied to either Mr. Bester or an independent broker, the company is unable to establish that *any* tractor trailer delivery is work permitted by section 73.1. As an application of the reverse onus found in section 73.1(9), the company should not be permitted to perform any work that it cannot establish is specifically allowed by section 73.1. To do otherwise would be to deny the union a remedy where a violation has been established. Such a remedy is also consistent with the purpose of section 73.1.
- (c) an order that if the company continues to perform deliveries using tractor trailers, that it pay damages on an ongoing basis to the union reflecting the percentage of tractor trailer deliveries which Mr. Bester had performed before the strike/lockout. The damages would be based on the delivery costs of the shipments. Such an order of damages would take into account the unjust enrichment accruing to the company out of its violation of section 73.1, and would compensate the union for the loss of bargaining power which it suffers as a result of this continuing violation.

65. In argument of both counsel, I was referred to the Board's decisions in *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270 ("*Famous Players #1*"); *The Great Atlantic & Pacific Company of Canada, Limited*, [1994] OLRB Rep. Mar. 303; *Canada Stamping and Dies Limited*, [1994] OLRB Rep. Mar. 213; *Famous Players Inc.*, [1994] OLRB Rep. Feb. 131 ("*Famous Players #2*");

Toromont, a division of Toromont Industries Ltd., decision dated August 9, 1994 (unreported) [now reported at [1994] OLRB Rep. Aug. 1149]; *Mississauga Hydro Electric Company*, [1994] OLRB Rep. July 883; *Labatt's Ontario Breweries*, [1994] OLRB Rep. June 704; *Marriott Management Services*, [1994] OLRB Rep. June 729 and *The Canadian Red Cross Society Ontario Division*, [1994] OLRB Rep. Jan. 34.

66. Section 73.1 provides:

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

67. Some of the cases to which I was referred comment on the purposes of section 73.1. In general, the Legislature has determined that it ought to enhance a union's ability to wage a successful strike by limiting the extent to which a struck employer can carry on business. As a corollary, the sections can likewise be seen as limiting the effectiveness of a lockout as an economic weapon.

68. Of course, reference to the purposes of section 73.1 is helpful only to a point; the specific language found in section 73.1(5) and (6) must be applied to determine the ambit of the prohibition against using replacement workers, and therefore the scope of an employer's ability to carry on business during a strike or lockout. In *Labatt's Ontario Breweries*, *supra*, the Board stated:

19. It is also difficult to infer from the language of these sections any general assumption that an employer is entitled to operate during a labour dispute. On the contrary, the very comprehensiveness of the prohibitions in section 73.1 suggests that in many cases, operations will be brought to a temporary standstill. And if the purpose of section 73.1 is to inhibit a struck

employer's ability to carry on business, one can hardly say that ceasing production is not contemplated by these provisions.

20. On the other hand, we share the company's views that these sections do not give rise to any general assumption that a struck employer should not be able to operate, as long as it can do so without contravening the statute. Indeed, the fact that section 73.1 allows the use of some persons in specific circumstances suggests that an employer may well attempt to continue operations, and section 73.2(2) makes this explicit in certain situations.

21. In other words, it is difficult to divine from these provisions an underlying or general assumption with respect to either continuing or ceasing production. As a result, we find it more fruitful to focus on the specific language of the relevant sections.

69. The Board also noted in *Labatt's Ontario Breweries* that the replacement worker prohibitions may have a different impact on a given labour dispute depending on the circumstances. The extent to which these provisions serve to enhance a union's bargaining strength may well vary depending on the bargaining strength of the employees wholly apart from these provisions. There will be some bargaining units that are highly specialized and which constitute a critical part of an employer's enterprise. Such a bargaining unit may well have economic strength disproportionate to the number of employees which are encompassed by the unit, as compared to the total work force. As well, there will be bargaining units whose very comprehensiveness means that it will be virtually impossible for an employer to continue business during a strike or lockout.

70. On the other hand, there will also be bargaining units which have limited economic strength, and for which the provisions of section 73.1 may provide cold comfort in the event of a strike or lockout. Implicit in the employer's arguments in this case is the conclusion that this is one of those bargaining units.

71. This case ultimately narrows down to two issues: a) the application of the phrase "the work of an employee in the bargaining unit that is on strike or is locked out" as used in section 73.1(5)(2), to the facts of this case, and b) the determination of how work is distributed as between the members of the bargaining unit and the independent brokers and the extent to which this distribution of work is controlled by Nelson, or by its customers. In interpreting the phrase "the work of an employee in the bargaining unit", the Board has stated that the contrast between sections 73.1(5)2 and 73.1(5)3 suggests that its meaning is not confined to work *ordinarily performed* by bargaining unit employees, but may be broader: see *The Great Atlantic & Pacific Company of Canada, Limited, supra*. The Board has also stated that while the collective agreement and past practice may provide considerable assistance in determining "the work of an employee in the bargaining unit", these sources are not necessarily conclusive: *Famous Players #1*, and *Canada Stamping and Dies Limited, supra*. In *Famous Players #1*, the Board stated:

44. The fact that a function is specified in the collective agreement is persuasive evidence that the particular function should be considered the work of bargaining unit members (although perhaps not exclusively). Similarly, past practice may provide some useful guidelines: the "work of employees in the bargaining unit" is what employees, in the past, have customarily done. But the impact of a strike may well prompt an employer to modify the way in which work is performed, so that there may not be an exact correlation with what went before. *Individuals may be doing "the work of employees in the bargaining unit" within the meaning of section 73.1, even though the work might not have been done that way before.*

45. A hypothetical example may illustrate what we mean.

46. Suppose the employer's operation required employees to handle material and move boxes. Suppose that they ordinarily did that work by using motorized lift trucks, and that there is a "lift truck driver" rate in the collective agreement. Clearly the operation of a lift truck would be considered bargaining unit work. But so is moving boxes. Thus, if the employer hired six new work-

ers during a strike to move the boxes *manually*, that would still be “bargaining unit work”, even though members of the bargaining unit may not have performed that precise function before.

[emphasis added]

72. The Board has also observed, in *Canada Stamping and Dies Limited* that it is better to take an approach which looks at the substantive, regular content of the work of an employee in the bargaining unit, rather than scrutinizing every function no matter how incidental to a person’s normal job.

73. I shall deal first with the situation of Wilfred Bester, and then the rest of the employees in the bargaining unit. Even on a fairly narrow reading of section 73.1(5)2, there is no doubt that independent contractors, or drivers employed by independent contractors, are performing work during the strike lockout which had been performed by a bargaining unit member, Mr. Bester, prior to this time. Even accepting the company’s theory that there is a distinction between the work of the tandem and single axle truck drivers, and tractor trailer drivers, Mr. Bester’s work consisted of the delivery of aggregate for Nelson by tractor trailer. Independent contractors have been, since August 3rd, regularly engaged to deliver aggregate for Nelson by tractor trailer.

74. There is no evidence that the employer has taken any measures to avoid engaging independent brokers to perform work which at least one member of the bargaining unit would have performed but for the strike; the employer does not even advance such an argument. The argument of the employer is that upon Mr. Bester’s resignation, the work performed by members of the bargaining unit for the purposes of section 73.1 no longer includes the delivery of stone by tractor trailer.

75. The union disputes that Mr. Bester’s resignation is genuine. I do not need to decide this issue, for even assuming that it is a *bona fide* resignation, I do not find that it has the effect on the application of section 73.1 urged by the employer. It would be inconsistent with the thrust of the provisions of section 73.1 to take account of changes to the composition of the bargaining unit after the strike/lockout starts. The phrase “the work of an employee in the bargaining unit” necessarily refers to the work performed by employees in the bargaining unit before the start of a strike or lockout. After all, once the strike or lockout starts, *no one* in the bargaining unit is performing any work.

76. Further, the integrity of the prohibitions found in section 73.1 is better preserved by defining the work of employees in the bargaining unit by reference to pre-strike, “normal” times. It would not be surprising if events occur during a strike or lockout which otherwise would not have; the Board would be relying on an uncertain and shifting foundation to give such effect to the actions of parties or individuals which occur against the backdrop of job action with its attendant pressures and considerations.

77. I am therefore satisfied that during this strike/lockout, Nelson has engaged independent contractors to perform the work of an employee in the bargaining unit, in violation of section 73.1(6)4 and 5.

78. Turning to the members of the bargaining unit driving tandem and single axle vehicles, it was argued by the company that there is a significant difference between the work of these persons and the work of the independent brokers. It was asserted that the work of the bargaining unit (apart from Mr. Bester) consisted of and is limited to the delivery of crushed stone by these particular vehicles. As I have set out earlier, it is the position of the union that the work of employees in the bargaining unit for the purposes of section 73.1 can be described simply as the delivery of crushed stone.

79. The collective agreement does not specifically limit the functions of the employees in the bargaining unit. In general, the unit is described as “dependent contractors”. Rates of pay vary by types of vehicle. Some of the provisions apply only to drivers of certain vehicles. Article 12.02 provides:

12.02 The Company shall not contract out to brokers any single axle or tandem deliveries to its customers if such deliveries can be performed by members of the bargaining unit within two (2) hours of the Company’s request.

80. Although this provision provides a guarantee of certain work to members of the bargaining unit, it does not establish that the drivers of single axle or tandem trucks have a preferential claim to all deliveries of stone undertaken by Nelson. If anything, by its omission of tractor trailer deliveries, it suggests that the parties see the work of delivering stone by tractor trailer as distinct from the work of delivering stone by tandem or single axle truck. Further, the language of this provision is not “any deliveries” or “all deliveries”, but only “single axle and tandem deliveries”. This also suggests that the work of making deliveries by different types of vehicles is not interchangeable.

81. Taken alone, the collective agreement language is of limited assistance in defining the work of employees in the bargaining unit for purposes of section 73.1. I have determined however, on the basis of the evidence concerning the actual practices of the company, that it is not plausible to describe the work of the employees in the bargaining unit as simply the delivery of crushed stone, undifferentiated from the work of persons outside the bargaining unit. I find that, apart from Mr. Bester, the company does not fill its customers’ orders using the dependent brokers and the independent brokers interchangeably. The work of both groups of brokers is defined and limited by the type of vehicle driven.

82. The evidence reveals that there are several factors which influence whether a particular type of vehicle is used to deliver stone. The most important factor is the delivery cost. Delivery costs are fixed costs which are passed on directly by Nelson to its customers based on the amount Nelson pays the brokers. It was not controversial that delivery costs per tonne are highest for deliveries by single axle trucks, next highest for deliveries by tandem trucks, and lowest for deliveries by tractor trailers. Where the amount of stone ordered by a customer is such that there may be an option as to which type of vehicle is used for the delivery, it is understood that the costs for delivering the material will vary according to the type of vehicle chosen. The cost of delivered material is negotiated and settled prior to delivery. This final price contains a portion reflecting delivery costs, based on the type of vehicle to be used, and the cost of the materials.

83. Another factor taken into account in determining the type of vehicle used to deliver stone is the location to which the material is to be delivered. There are some locations, such as the inside of buildings under construction or narrow roadways, where a tractor trailer delivery is impractical. A third factor described by one customer of Nelson is the ability of tandem trucks to make small, shallow drops of stone at several locations at the delivery destination.

84. All of the above points to three general conclusions: (a) that in the ordinary course, the determination of the type of vehicle used to make a delivery is set at the time a customer accepts a price for delivered material from Nelson, which price reflects delivery costs for a specific type of vehicle; (b) where the amount of material ordered is such that there is an option as to which type of vehicle is used to make the deliveries, a customer is likely to choose the cheapest alternative, absent special factors such as limited access; (c) effectively, the decision by a customer as to quantity, price or type of vehicle determines whether work is assigned to members of the bargaining unit, or brokers outside of the bargaining unit.

85. Members of the bargaining unit testified as to deliveries they have made in tandem trucks to sites where tractor trailers were also making deliveries from Nelson, even on the same day. As I have indicated, the documentary evidence suggests that this is an uncommon occurrence. It falls far short of establishing that the two types of vehicles are interchangeable in making deliveries. Further, given the other evidence concerning the cost of deliveries and the way transactions occur between Nelson and its customers, I am unable to conclude that if there were tandem trucks and tractor trailers delivering the same material to the same site, this is a result of anything other than a decision made by the customer. I find it unlikely that in a situation where a customer has contracted with Nelson for delivered material, Nelson would (other than in exceptional circumstances) use a different type of vehicle than was the basis of the agreed price. If customers are likely to choose the cheapest alternative, likewise it is fair to conclude that Nelson will also use the cheapest way of fulfilling the contract.

86. I conclude, therefore, that there is a distinction between the work performed by members of the bargaining unit (apart from Mr. Bester) and the work performed by the independent brokers. The work of delivering stone by tandem axle truck, by single axle truck, and by tractor trailer is not the same to the extent that the work opportunities of any of the drivers are defined and limited by the type of vehicle they drive. As is evident from the above, I have also found that work opportunities are distributed as between the tandem truck drivers, the single axle truck driver and the other drivers, on the basis of a *customer's* decision either to request a type of vehicle specifically, or to agree to buy material at a price or in a quantity which is understood to be based on delivery by a certain type of vehicle.

87. Since the beginning of the strike/lockout, Nelson has not engaged any tandem or single axle trucks to perform deliveries for it. This, however, is not determinative, for the union asserts that the work of employees in the bargaining unit has been *transferred* to the tractor trailers of the independent brokers, or, to put it another way, that Nelson is having the same work done by a different method. The union relies on the excerpt from *Famous Players #1* set out in paragraph 73 above.

88. The parties spent some time on statistical comparisons of the company's activities in 1993, and during the strike/lockout. Since the number of deliveries being made by independent brokers has increased significantly in August of 1994 over August of 1993, the union asks me to draw the inference that this can only be accounted for by the transfer of the work of employees in the bargaining unit to the independent brokers. In the absence of any other evidence, this inference would be difficult to resist. Having carefully examined the evidence, however, I am satisfied that the employer is not having the work of the bargaining unit employees performed under a different guise.

89. The evidence points to a variety of different explanations for the increase in business to Nelson of material delivered in tractor trailers. For instance, one customer, Canada Building Materials, which had in the past bought stone from the Uhtoff quarry owned by Nelson Aggregate Co., decided in 1993 to switch to Nelson Quarry. The agreement to purchase this stone was based on tractor trailer delivery and was concluded in the first part of 1993, well prior to the strike and even to the collective bargaining. The first shipments pursuant to this agreement were made either in July or November of 1993.

90. A significant portion of the business in 1994 is related to the discontinuance of the railway shipment of stone from the Uhtoff Quarry in Orillia to Nelson Aggregate Co.'s Milliken and Pinecrest depots, both located in the Metropolitan Toronto area. This decision was made during the fall of 1993, but shipments from Nelson did not start until sometime in 1994, perhaps as late as

August. It was not suggested that the decision to ship stone from Nelson to these two depots was taken to avoid the consequences of a strike/lockout. Nor was it suggested that I should analyze the factors that led to the shipment of this stone by tractor trailer any differently than for a non-arm's length customer of Nelson. Having regard to the quantities of stone being shipped by tractor trailers and by other vehicles, I am satisfied that this is not work which would have been performed in the general course by members of the bargaining unit driving tandem and single axle trucks.

91. There was also evidence regarding other new business (for instance, the supply of stone to an asphalt plant owned by Associated Paving) which I am satisfied would not have been assigned in the general course to members of the bargaining unit.

92. I do not accept the company's argument that where work performed during a strike/lockout is new in the sense that it reflects a new customer, or work which had otherwise not been performed before, such work is by definition not "the work of an employee in the bargaining unit". As the Board stated in *Famous Players #1*, individuals may be doing "the work of employees in the bargaining unit" within the meaning of section 73.1 even though the work might not have been done that way before. In the instances outlined above, however, I am satisfied that the delivery work in connection with those activities is not work which bargaining unit members would have performed but for the strike.

93. Even factoring in the above explanations for the increase in Nelson's use of independent brokers during the strike, the evidence does suggest that some of the increase is caused by customers who have chosen to purchase tractor trailer loads of stone *in place* of tandem loads. As outlined above, some of Nelson's customers that regularly bought tandem loads of stone in 1993 have received tractor trailer shipments in August 1994. Does this constitute a violation of section 73.1? The answer lies in an examination of the typical transaction to purchase stone, after the beginning of the strike.

94. The evidence is that, after August 3rd, Nelson's staff were instructed to and did inform its customers that Nelson could not offer material to be delivered by tandem and single axle trucks. When a customer which otherwise was interested in purchasing material to be delivered by tandem or single axle truck is informed of this, it appears likely that one of three results ensues. First, the customer may decide to go elsewhere for its material. There was evidence, for instance, that the tandem truckloads of stone which one customer uses on a regular basis in its roadbuilding business is now obtained from a competitor of Nelson. Second, the customer may decide to send its own vehicles to pick up the material. This has also occurred. Third, the customer may decide that it is just as happy buying a larger quantity of stone, to be delivered by tractor trailer. There was no direct evidence that customers have chosen this third option; however, I find it a reasonable inference from all the evidence before me, particularly in the few instances where Nelson's customers have had the same type of material delivered to the same site by tractor trailer during the strike/lockout, as had been delivered by tandem vehicles in 1993. Assuming, therefore, that some customers have chosen the third option, the result would have been that Nelson engaged an independent broker to perform the work.

95. I note here that the documentary evidence does not indicate that during the strike/lockout, any tractor trailers have delivered stone out of Nelson bearing only a tandem-weight or single axle weight load. In other words, it does not appear, and the union does not dispute this, that Nelson has used tractor trailers to deliver less than full tractor trailer loads of stone.

96. It is fairly clear that the first and second results sketched out above do not involve the employer in a breach of section 73.1 (assuming an arm's length, commercial relationship between Nelson and its customers and dealing here only with the tandem and single axle vehicle operators).

The fact that the third result involves the use of independent brokers also does not bring Nelson in violation of the replacement worker provisions. There is nothing in section 73.1 which prevents Nelson from continuing to engage independent brokers driving tractor trailers in a manner consistent with its prior practices. There is no evidence that Nelson has induced its customers to change an order for a tandem or single axle load of stone to a tractor trailer load, for instance by manipulating the pricing. If it can be said that some of the customers which bought tractor trailer loads of material during the strike/lockout would not have done so but for the strike/lockout, this is a result in the hands of Nelson's customers, and not of Nelson.

97. I am therefore satisfied that to the extent there has been an increase in August of 1994 over August of 1993, in the amount of deliveries being made by independent brokers, this increase is not attributable to a "transfer" of work of employees in the bargaining unit (save Mr. Bester). Nor is it attributable to a decision by the employer to have the same work performed, for the same end, by a different method. I find the facts of this case distinguishable from that portion of *Famous Players #1* referred to by union counsel, wherein the Board canvassed the effect of a change in work method on the application of section 73.1(5).

98. If there is an increase in the number of deliveries by tractor trailer, it is because Nelson's customers have increased their demand for such. It may be that part of this increased demand is a function of the strike/lockout, and part of it is unrelated to the strike/lockout. The key point is, however, that in neither case has Nelson changed the manner in which it conducts its business, except to inform its customers of its inability because of the strike/lockout to provide deliveries of stone by tandem or single axle trucks. In sum, I am not persuaded that the Act prohibits this employer, in the particular factual context of this case, from meeting an increased demand which has not been shown to be bargaining unit work.

99. It may appear that my findings here are inconsistent with the decision of the arbitrator on June 27, 1994, in which he found that the company had violated the collective agreement in withholding from the single axle and tandem truck drivers aggregate loads which they would have made in the ordinary course of the employer's business. The findings of the arbitrator appear to suggest that there is some claim to the work performed by tractor trailers, by members of the bargaining unit driving tandem and single axle trucks. If this is so, then the bargaining unit (save in Mr. Bester's case) is left in a worse position under section 73.1 of the Act, than under the terms of its collective agreement.

100. It is somewhat difficult to assess the scope of the findings of the arbitrator. On my review of that decision, it appears that the issue of damages, which has not yet been resolved, may well be the stage at which the precise implications of that decision are determined. In the absence of a more precise determination, I do not find the arbitration decision to be of much assistance in the present case.

101. In one respect, however, I take account of the arbitration decision. The strike/lockout commenced on March 7th. To the extent that the findings of the arbitrator make the events from December 23 to June 27 an anomaly in determining the regular work of the employees in the bargaining unit, I arrive at my findings by looking at the manner in which work was performed *before* this period. Since an arbitrator has found that the employer's manner of operations during this period was in some measure in violation of the agreement, I do not rely on this manner of operations in my determination of the meaning of the "work of an employee in the bargaining unit".

102. In other words, I arrive at my findings even assuming that Nelson continued to operate until the advent of the strike/lockout in the same manner it did during May to August of 1993,

accepting tandem and single axle deliveries as well as tractor trailer deliveries and assigning such work to the employees in the bargaining unit.

103. Prior to the conclusion of the company's case, the union raised allegations concerning deliveries which were made during the course of the hearing by Angelo Di Adamo, a member of the bargaining unit. I ruled that I would hear the evidence concerning the new allegation as part of this case. The parties agreed that to the extent the hearing of this issue required the company to recall any of its witnesses, cross-examination would be limited to this new issue. I need not deal with this issue at length. I am satisfied on the balance of probabilities that Mr. Di Adamo was not performing work for Nelson delivering stone, but was picking up stone for his own use. Among other things, the documents show that on five other occasions in August of 1994, the construction company owned by Mr. Di Adamo bought stone from Nelson which was delivered by an independent broker.

Remedy

104. I now turn to the issue of remedy with respect to the violation of section 73.1 that I have found. The union has requested that it be permitted to monitor the company's interchanges with its customers, relying on the terms of the consent order in *Diamond Taxicab Association (Toronto) Limited, supra*. Since I have found a violation with respect to the work formerly performed by Mr. Bester only, and this finding does not depend on the particularities of the dealings between Nelson's staff and its customers, I do not find such a remedy appropriate. This does not mean that some sort of continuing disclosure by Nelson of its activities may not be appropriate, as part of my remedial directions. I return to this later.

105. The union has also requested that the Board simply order Nelson to cease all deliveries of material for the duration of the strike/lockout, on the theory that the company is unable to prove that *any* particular load of material delivered by an independent broker is a load that Mr. Bester would have delivered but for the strike. There are several difficulties with this. First, neither can the union establish that any particular load of material *would* have been delivered by Mr. Bester but for the strike. Second, there is no doubt that the company has regularly engaged independent brokers, consistent with its collective agreement, to deliver material by tractor trailer. There is no doubt that a portion of the work it is now having performed by independent brokers is consistent with this past practice. Finally, in addition to the disproportion of such an order in relation to the magnitude of the violation, it would have a severe impact on the rights of others such as the production workers and the independent brokers.

106. I do not find reference to the reverse onus helpful in fashioning an appropriate remedy, as suggested by counsel for the union. By the very words of section 73.1(9), the reverse onus applies to the determination of whether an employer has acted contrary to that section. It does not mean that where both parties have difficulty in pinpointing the exact transactions which are a violation of the section, the Board ought to issue an order which covers all of the company's activities, even if a portion of them are certainly permissible under section 73.1.

107. I therefore decline to grant the direction in the broad terms requested by the union. It is not clear to me as yet that a direction which is more appropriate to the extent of the violation of section 73.1 is not available. Although the fluidity of the line between Mr Bester's work and the work performed by independent brokers makes it difficult to make findings and remedies based on particular deliveries, certain things are ascertainable and quantifiable. Here, there is a precise record in the form of haulage reports of the activities of all the tractor trailer drivers prior to the strike. It is possible to determine the amount of work which Mr. Bester performed for the company prior to the strike/lockout, compared to the independent brokers. The Board has recognized

the idea that in order to give effect to section 73.1, it may be appropriate to assess the amount or proportion of work performed by employees in the bargaining unit prior to a strike or lockout relative to non-bargaining unit personnel. This may be the only sensible way to approach those situations where the functions performed by these two groups are not easily distinguishable.

108. The union has requested that I take account of the proportion of the work of delivering material by tractor trailer that Mr. Bester had performed prior to the strike, in the context of its request for what it characterizes as "unjust enrichment" damages. These damages, in the submission of the union, should be paid if the employer continues to make deliveries by tractor trailer.

109. Implicit in the union's request for this type of unjust enrichment relief is the assumption that it is warranted where the Board finds itself unable to fashion a practicable cease and desist direction against further violations of section 73.1. I do not determine at this point whether I should order such a remedy. If it is available in this case as a prospective measure, it is likely only warranted where it is not possible for the Board to issue a meaningful cease and desist direction. Until I have received the parties' submissions I am not satisfied that this cannot be done. I therefore defer consideration of this issue pending my findings on the appropriate terms of a cease and desist order, if any.

110. The parties are accordingly directed to make submissions as to the appropriate formula, if any, for determining the scope of a cease and desist direction, having regard to my findings above. These submissions should consider, for instance, whether the Board should restrict Nelson to a certain number of deliveries in a given period, and if so, how the Board should arrive at both the number of deliveries and the period of time covered. The parties should consider how daily, weekly or seasonal fluctuations in work should be taken into account, and whether in support of any cease and desist direction, the Board ought to order periodic disclosure by the company of its activities.

111. These written submissions shall be delivered to the Board and to counsel for the parties by no later than 5:00 p.m., January 16, 1995.

112. The parties have agreed that I should remain seized of the issue of damages, if any, which may be owing as a result of the employer's past violations of section 73.1.

3024-94-R United Steelworkers of America, Applicant v. Oryx Fixtures Inc., Responding Party

Certification - Laid-off employee attending course at employer's expense on application date - Board holding that employee should be included on list of employees for purposes of the count - Board directing representation vote

BEFORE: *Louisa M. Davie*, Vice-Chair.

APPEARANCES: *Mark Rowlinson* and *Gord Gow* for the applicant; *Scott T. Williams* for the responding party.

DECISION OF THE BOARD; January 10, 1995

1. This application for certification came on for hearing on January 9, 1994. Prior to the hearing the parties reached agreement on all matters in dispute between them save for the single issue noted herein. For ease of reference the applicant United Steelworkers of America will be referred to either as "Steelworkers" or "the Union" and the responding party will be referred to simply as "the Employer" or "Oryx".
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all office, clerical and technical employees of Oryx Fixtures Inc. in the City of Barrie, save and except Managers, persons above the rank of Manager, Accountant and persons for whom any trade union held bargaining rights prior to November 23, 1994, constitute a unit of employees of the responding party appropriate for collective bargaining.
4. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.
5. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards are signed by each employee concerned and indicate a date within the six-month period immediately preceding the application date. The membership evidence is supported by a duly completed Declaration Verifying Membership Evidence.
6. The parties disagreed whether James Deacon should be included on the list of employees for purposes of determining the count. The parties filed an agreed statement of facts with the Board with respect to that issue. The facts relevant to the Board's determination can be briefly summarized.
7. Mr. Deacon has been in the employ of the responding party for approximately one year. He is employed in the engineering department. It is not disputed that he is normally employed in the bargaining unit.
8. On or about September 20, 1994, at the suggestion of the employer, Mr. Deacon enrolled in an autoCAD introductory course at Georgian College in the City of Barrie. Although Mr. Deacon's enrolment in the course was voluntary and not mandatory, it is not disputed that the course was either integral to the duties performed by Mr. Deacon for the employer (the employer's position), or at the very least was related and relevant to his job duties (the trade union's assertion). It is agreed that there is a nexus between his job duties and the course taken. The skills acquired by Mr. Deacon as a result of taking the course made him a more useful employee to Oryx.
9. On November 18, 1994 Mr. Deacon (together with two other employees in the bargaining unit) was laid off. It is anticipated that each of these employees will be recalled to work in February 1995.
10. The applicant union filed its application for certification on November 23, 1994. On that date Mr. Deacon was in attendance at the course (the course was scheduled for two evenings per week for three hours each evening).
11. Oryx reimbursed Mr. Deacon for the cost of the course. It also remunerated him for the time he spent attending the course.

12. Mr. Deacon's employment status is not in dispute insofar as he is clearly an employee of Oryx and it is agreed that he is in the bargaining unit. The real issue in this case however is whether he was employed in the bargaining unit on the application date and should therefore be included on the list for purposes of the count.

13. Having carefully considered the able submissions of both counsel, I am of the view that Mr. Deacon is properly on the list of employees for purposes of the count. Mr. Deacon's attendance at the course on November 23, 1994 had been prearranged and predetermined prior to his lay-off of November 18, 1994. In this regard I accept that although Mr. Deacon had been laid-off from his regular duties on November 18, 1994, at the time of his lay-off it was agreed that he would continue with his predetermined attendance at the course. Mr. Deacon was paid by Oryx for the time he spent attending the course. There is an nexus between the course and Mr. Deacon's job duties on behalf of Oryx.

14. If, on the date of application, Mr. Deacon had attended a three hour course related to his job duties at the employer's premises and had been paid for that attendance, there would be little doubt that he would be included in the bargaining unit. The fact that this course was at Georgian College in the City of Barrie rather than the employer's own premises in the City of Barrie does not alter the fact that he was "at work" on behalf of the employer when attending a course related to his job duties for which attendance he was paid.

15. Mr. Deacon's "lay-off" on November 18, 1994 also does not alter the fact that after that date, for three hours an evening two days a week, he continued to be "at work" for the employer performing, in essence, preassigned duties (attendance at the course) for which he was remunerated by the employer.

16. In all of the circumstances I find that Mr. Deacon is properly on the list of employees. On the basis of all the evidence before me I am satisfied that not less than forty-five per cent of the employees of the responding party in the bargaining unit on November 23, 1994, the certification application date, had applied to become members of the applicant on or before that date.

17. A representation vote will be taken of the employees of the responding party in the bargaining unit. All those employed in the bargaining unit on November 23, 1994, who are so employed on the date the vote is taken will be eligible to vote.

18. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

19. The matter is referred to the Registrar.

4171-93-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Reynolds-Lemmerz Industries, Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Employees - Practice and Procedure - Whether persons employed in disputed classifications should be included in bargaining unit - Employer failing to comply with Board direction to file particulars of its position including details of job functions and basis for employer's request - Board deciding matter based solely on statement of facts filed by union and on parties' oral argument - Board not satisfied that lead hands, line persons and senior deburrers exercising managerial functions within meaning of Act - Facts not supporting submission that lead hands, line persons and senior deburrers not sharing sufficient community of interest with other members of proposed bargaining unit - Final certificate issuing

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

APPEARANCES: *Catherine Gilbert* for the applicant; *Philip J. Wolfenden* for the responding party.

DECISION OF THE BOARD; January 31, 1995

1. In a decision dated March 28, 1994, the Board certified the applicant on an interim basis for a bargaining unit described as follows:

all employees of Reynolds-Lemmerz Industries in the Town of Collingwood, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and, *pending resolution by the Board, excluding as well,*

- (I) Quality Assurance staff
- (II) Lead Hands
- (III) Senior Deburrers
- (IV) Linemen.

(emphasis added)

2. A Labour Relations Officer was then appointed to inquire into and report to the Board on the duties and responsibilities and the community of interest with the bargaining unit of the persons employed in the disputed classifications. By decision dated September 1, 1994 [now reported at [1994] OLRB Rep. Sept. 1242], the Board revoked the appointment of the Labour Relations Officer, directed the Registrar to schedule a hearing before a panel of the Board to deal with these issues, and imposed the following procedural obligations on the parties:

Not later than two weeks prior to the commencement of that hearing, the employer is required to file with the Board and the union particulars of its position as to the inclusion or exclusion of the members of the disputed classifications, including the details of their job functions and the basis for the employer's request. Within one week of the receipt of this material, the union must file a detailed response to the employer's position.

3. As matters developed, the employer failed to comply with these obligations and, for reasons given orally at the hearing, the Board (R. M. Sloan dissenting) ruled that it would proceed to deal with the issues based solely on the statement of facts filed by the applicant and on the par-

ties' oral arguments. The classifications to which this ruling applies are set out in paragraph 3 of the following minutes of settlement entered into by the parties on the morning of the hearing:

ONTARIO LABOUR RELATIONS BOARD

Board File No: 4171-93-R

Between:

National Automobile, Aerospace and Agricultural Implements Workers Union of
Canada (CAW-Canada)

Applicant

- and -

Reynolds-Lemmerz Industries

Responding Party

MINUTES OF SETTLEMENT

In the matter noted above the parties agree to the following:

1. The following classifications are agreed to be included in the bargaining unit:
 - (i) CMM Technicians
 - (ii) Lab Technicians and
 - (iii) Dimensional Technicians
2. The following classifications are agreed to be excluded from the bargaining unit:
 - (i) CMM Coordinator
 - (ii) Q.C. Auditor
 - (iii) Chem Lab Technicians
 - (iv) Fatigue Technicians
 - (v) Receiving Auditor
 - (vi) Reliability Engineer
 - (vii) SPC Coordinator and
 - (viii) Special Projects Coordinator
3. The following classifications are still in dispute:
 - (i) Lead Hand
 - (ii) Line Persons and
 - (iii) Sr. Deburrers

and the parties request that the Board reconvene the hearing, rule on any preliminary motions and proceed to determine the outstanding issues in dispute.

Dated in Toronto this 20th day of November, 1994

"Bruce Davidson"
For the Applicant

"James Gray"
For the Responding Party

4. The applicant's statement of facts with respect to the lead hands, line persons and senior deburrers reads as follows:

LEAD HANDS

28. It is submitted that the workers in the lead hand category are not "employees" for purposes of collective bargaining. Members of this job category exercise managerial functions, and should not be included in the bargaining unit.
29. Lead Hands enjoy and use the authority to issue verbal warnings or notices.
30. Lead hands enjoy and use the authority to effectively recommend that employees be given written warnings or disciplinary notices.
31. Lead hands sign written warnings or disciplinary notices. Lead hands are present when written warnings or disciplinary notices are given.
32. On February 18, 1994, a lead hand named Mark Ralston signed a written warning to Morgan Lawrence. Mr. Ralston did not sign as a witness. (see Exhibit "D")
33. On July 27, 1994, Mark Ralston signed, as a witness, a final written warning and one-day suspension notice to Morgan Lawrence regarding insubordination by allegedly distributing CAW-Canada bulletins in the plant. The document was also signed by a supervisor named Charlie Dickieson. (See Exhibit "E")
34. On November 18, 1993, Mark Ralston signed a written warning to Morgan Lawrence. No other person signed this warning. (See Exhibit "F")
35. On March 18, 1994, a lead hand named Chris Beatty signed, as a witness, a written warning to Scott Cochrane of the Casting Department. (See Exhibit "G")
36. Lead hands enjoy and use the authority to schedule working hours outside of employees' regularly scheduled hours. Lead hands enjoy and use the authority, with the approval of foremen, to offer overtime work.
37. Lead hands enjoy and use the authority to allow or deny employees' requests to have time off or leave work early in certain circumstances.
38. Lead hands direct the day-to-day duties of employees. Most often, employees will know without instructions what is to be done. On certain occasions, such as when machines are not functional, lead hands enjoy and use the authority to give interim instructions.
39. Lead hands or foremen prepare and circulate a weekly time sheet for payroll purposes to be signed by operators.
40. Operators fill in a daily production sheet. These individual reports are turned over to the lead hands, who prepare departmental production sheets.
41. Lead hands enjoy access to employee files.
42. Lead hands attend weekly production meetings along with linemen, senior deburrers, and all supervisory staff at Reynolds-Lemmerz. Operators do not attend these meetings. (See Exhibit "H")
43. In the alternative, it is submitted that workers in the lead hand category do not share a sufficient community of interest with members of the proposed bargaining unit.
44. Lead hands perform physical shop work only for the purpose of accommodating employee lunch and coffee breaks. This occupies no more than one hour of their time per shift.
45. A considerable portion of a lead hand's time is spent doing supervisory work, disciplinary work, paperwork, checks, inspections or chemical work.

46. A desk, filing cabinet and locker are set aside for use by the lead hands. Production employees do not use these items. Lockers for the production employees are located in a separate area.
47. Although lead hands and operators take lunch and coffee breaks in the same cafeteria, lead hands enjoy longer lunch and coffee breaks. Further, lead hands may take coffee and lunch breaks at times of their own choosing.
48. Lead hands report to work earlier than do operators.
49. Lead hands are permitted to enter the company stores. Operators are not permitted to enter the company stores.

LINEMEN

50. It is submitted that the workers in the lineman category are not "employees" for purposes of collective bargaining. Members of this job category exercise managerial functions, and should not be included in the bargaining unit.
51. Linemen enjoy and use the authority to issue verbal warnings or notices.
52. Linemen enjoy and use the authority to effectively recommend that employees be given written warnings or disciplinary notices.
53. On October 6, 1994, a lineman named Stewart Reed signed, as a witness, a final written warning to Richard Boudreau. The warning was also signed by a supervisor named Jim Morwood. (See Exhibit "I")
54. On October 10, 1994, a lineman named Gerald Holmes signed a final written warning to Rick Geiger. The warning was also signed by a supervisor named Sean Cain. (See Exhibit "J")
55. Linemen enjoy and use the authority to schedule working hours outside of employees' regular schedules. Linemen enjoy and use the authority, with the approval of foremen, to offer overtime work.
56. In some situations, linemen enjoy and use the authority to allow or deny employees' requests to have time off or leave work early.
57. Linemen direct the day-to-day duties of employees. Most often, employees will know without instructions what is to be done. On certain occasions, such as when machines are not functional, linemen enjoy the authority to give interim instructions.
58. Linemen or foremen prepare and circulate a weekly time sheet for payroll purposes to be signed by operators.
59. Operators fill in a daily production sheet. These individual reports are turned over to the linemen, who prepare departmental productions sheets.
60. Linemen enjoy access to employee files.
61. Linemen attend weekly production meetings along with linemen, senior deburrers, and all supervisory staff at Reynolds-Lemmerz. Operators do not attend these meetings. (See Exhibit "H")
62. In the alternative, it is submitted that workers in the lineman category do not share a sufficient community of interest with members of the proposed bargaining unit.
63. Linemen perform physical shop work only for the purposes of accommodating employee lunch and coffee breaks. This occupies no more than one hour of their time per shift.

64. A significant portion of a lead hand's time is spent doing supervisor work, disciplinary work, paperwork or inspections.
65. A desk, filing cabinet and locker are set aside for use by the lead hands. Production employees do not use these items. Lockers for the production employees are located in a separate area.
66. Although linemen and operators take lunch and coffee breaks in the same cafeteria, linemen enjoy longer lunch and coffee breaks. Further, linemen may take coffee and lunch breaks at times of their own choosing.
67. Linemen report to work earlier than do operators.
68. Linemen are permitted to enter the company stores. Operators are not permitted to enter the company stores.
69. Linemen earn approximately thirty per cent more wages than do operators, deburrers or quality assurance workers.

SENIOR DEBURRERS

70. It is submitted that the workers in the senior deburrer category are not employees for purposes of collective bargaining. Members of these three job categories exercise managerial functions, and should not be included in the bargaining unit.
71. Senior deburrers enjoy and use the authority to issue verbal warnings to deburrers.
72. Senior deburrers enjoy and use the authority to effectively recommend that deburrers be given written warnings or disciplinary notices.
73. Senior deburrers sign written warnings or disciplinary notices to deburrers. Senior deburrers are present when written warnings or disciplinary notices are given to deburrers.
74. On July 28, 1994, a written warning was given to Jacquie Lawrence, signed only by a senior deburrer named Carolyn Greco. (See Exhibit "K")
75. Senior deburrers possess and exercise the authority to offer overtime work.
76. Senior deburrers possess and exercise the authority to send deburrers home.
77. When deburrers need time off work, they make their request to the senior deburrers. The senior deburrers forward these requests to a foreman.
78. Senior deburrers direct the day-to-day functions of the deburrers. The senior deburrers instruct the deburrers tasks to perform and material to work on.
79. When deburrers wish to temporarily trade shifts, the senior deburrers possess and exercise the authority to deny or allow their requests.
80. In cases of accidents in the deburring department, senior deburrers fill out the accident report.
81. The senior deburrers enjoy access to the personnel files on deburrers.
82. Senior deburrers attend weekly production meetings along with lead hands, linemen, and all supervisory staff at Reynolds-Lemmerz. Deburrers do not attend these meetings. (See Exhibit "H")
83. Senior deburrers are responsible for the training of deburrers. At the conclusion of a

three-month probationary period, they recommend the dismissal or retention of deburrers.

84. In the alternative, it is submitted that workers in the senior deburrer category do not share a sufficient community of interest with members of the proposed bargaining unit.
85. All senior deburrers perform supervisor, disciplinary and office work. They perform actual deburring on an irregular basis, and only when necessary. Some senior deburrers never perform actual deburring.
86. Senior deburrers spend at least one hour per shift doing paperwork.
87. Senior deburrers use an office area (sic) that includes a desk and a filing cabinet. These items are not used by deburrers.

5. In determining whether persons exercise managerial functions within the meaning of section 1(3) of the Act, the Board requires evidence of independent decision-making with respect to matters that have a significant but indirect impact on terms and conditions of employment of bargaining unit members, or evidence that the individuals in question exercise, at minimum, a power of effective recommendation over matters with more direct and immediate effects. "Effective recommendations" are ones which are "so consistently and frequently followed that it could be said that through the recommendations [the individuals in question] are effectively controlling or determining the decisions": *Etobicoke Hydro-Electric Commission*, [1981] OLRB Rep. Jan. 38. The Board considers the extent to which individuals exercise the authority to hire, fire, promote, demote, discipline, review performance, grant wage increases, assign work, assign overtime opportunities, grant time off work with or without pay, etc. In order for employees to be excluded from the definition of "employee" under the Act, the Board must be satisfied that the requisite authority is exercised with some frequency. A mere "sprinkling" of managerial tasks will not be sufficient. The onus is on the party seeking the exclusion to establish the necessary facts.

6. Having reviewed the applicant's statement of facts, and for the reasons set out below, the Board is not satisfied that the lead hands, line persons and senior deburrers exercise managerial functions within the meaning of the Act.

7. First, of the various areas of managerial decision-making identified in paragraph 5 of this decision, the disputed personnel appear to be involved only in discipline, overtime assignments and requests for time off work. There is no suggestion that the employees have any role in hiring, firing (except to the limited extent discussed below), promotion, demotion, performance reviews, granting or determining wage increases, or establishing work assignments. The additional tasks outlined in the statement of facts (i.e. directing the activities of employees who, for the most part, appear to know what work is to be done, preparing and circulating timesheets for signature by employees for payroll purposes, compiling departmental production sheets from individual sheets prepared by bargaining unit members, having access to employee files and attending at weekly production meetings) are not functions which are exclusively managerial. Further, the statement contained in paragraph 76 that "senior deburrers possess and exercise the authority to send deburrers home" is not sufficient either alone or in conjunction with the other tasks to warrant a finding of managerial status.

8. Second, with respect to those aspects of managerial decision-making in which persons employed in the disputed classifications appear to be involved, that involvement is limited. Independent decisions appear to be made only with respect to verbal warnings or notices, and with respect to time off work. In the latter case, the authority is said to be exercised only "in certain circumstances" and there is no evidence to suggest that employees are paid for the time off. More-

over, the power to make effective recommendations appears to be limited to written warnings. The witnessing of more formal discipline (e.g. one day suspensions or “final warnings” before discharge) qualifies neither as an independent decision or an effective recommendation. Likewise, the statement continued in paragraphs 36 and 55, for example, that “linemen enjoy and use the authority, with the approval of foremen, to offer overtime work” gives no indication as to whether these offers proceed from an “effective recommendation”. Further, and apart from this function, what is meant by “the authority to schedule working hours outside of employees’ regularly scheduled hours” is unclear.

9. Finally, there is no suggestion that any of the foregoing activity occurs with any real frequency.

10. In short, it appears to the Board that the employees in question are not front line management but, at most, typical “lead hands” who would ordinarily be included within the definition of employee under the Act.

11. The applicant also argues that the lead hands, line persons and senior deburrers should not be included in the bargaining unit because “they do not share a sufficient community interest with other members of the proposed bargaining unit”. The facts do not support this conclusion.

12. At least since the Board’s decision in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the concept of “community of interest” has played an increasingly limited role in the Board’s determination of appropriate bargaining units. Recently, in *Active Mold Plastic Products Ltd.*, [1994] OLRB Rep. June 617, the Board dealt with the concept of community of interest as follows:

29. Most recently, in *Burns International Security Services Limited* (unreported, April 7, 1994, Board File 3340-93-R), the Board addressed the utility of the concept of “community of interest”. In this decision, it was noted that the term “community of interest” does not usually provide the Board with much assistance in determining whether an applied for bargaining unit is appropriate. It was observed in this decision that the focus before the Board in bargaining unit determination cases should be upon “concrete problems rather than the sometimes nebulous concept of ‘community of interest’”. After citing a passage from *Homewood Health Centre* [1992] OLRB Rep. Feb. 181, in which *Hospital for Sick Children* is once again referred to, the Board observes as follows at paragraph 30:

These passages suggest a more flexible approach, focusing on the problems caused or averted by particular bargaining unit configurations, rather than so-called Board policies that may or may not reflect current labour relations realities. This is not to say that history or existing practices are irrelevant. History can be a useful guideline to what is appropriate because established practice may reveal what works and what does not. And, of course, there is some virtue in certainty and simplicity - hence the Board’s inclination to define bargaining units with respect to the geographic municipality in which the employer operates. But as the practice in the security industry amply illustrates: multiple locations, or even multiple municipalities may also be appropriate bargaining units.

30. This panel of the Board agrees with the approach to the concept of “community of interest” which is reflected by the decision of *Burns International Security Services Limited*, described above. In the case before us, we found the numerous references to “community of interest” to be unhelpful. As noted by the Board in *Burns International Security Services Limited*, all employees share a “community of interest” by virtue of working for the same employer. In point of fact, there are numerous “communities of interest” that can be identified in any particular workplace. It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied “communities of interest” in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board’s focus should be upon the concrete,

demonstrable problems which will result from the applicant's proposed bargaining unit should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant's proposed bargaining unit will be acceptable to the Board.

13. In this case, it is evident that the lead hands, line persons and senior deburrers share a sufficient community of interest to bargain together in a viable way with the rest of the agreed upon bargaining unit. The performance of office work, differences in hours of work and locations of lockers, access to company stores, etc., are not sufficient to deprive employees of the ability to bargain together in a viable way under one agreement; nor do they amount to serious labour relations problems.

14. Accordingly, and having regard to the Board's decision dated March 28, 1994 and the agreement of the parties, the Board hereby certifies the applicant as bargaining agent for all employees of Reynolds-Lemmerz Industries in the Town of Collingwood, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, CMM Coordinator, Q.C. Auditor, Chem Lab Technicians, Fatigue Technicians, Receiving Auditor, Reliability Engineer, SPC Coordinator and Special Projects Coordinator, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

15. A final certificate will issue to the applicant.

3565-94-M United Brotherhood of Carpenters and Joiners of America Local 1030, Applicant v. IWA-Canada, Local 1-1000 and Tembec Forest Products (1990) Inc., Responding Parties

Interim Relief - Jurisdictional Dispute - Remedies - Carpenters' union representing employees at employer's planning mill - IWA representing employees at employer's sawmill - Carpenters' union making jurisdictional dispute complaint in respect of employer's plan to consolidate operations of planning mill and sawmill at location of sawmill - Carpenters' seeking interim order preventing employer from relocating planning mill pending determination of jurisdictional dispute complaint - Interim relief application dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Rundle* and *P. V. Grasso*.

APPEARANCES: *N. L. Jesin* for the applicant; *David Wright*, *Kelly Wadingham* and *Mike McCarter* for IWA-Canada, Local 1-1000; *David C. Daniels* for Tembec Forest Products.

DECISION OF THE BOARD; January 25, 1995

1. This is an application for interim relief brought pursuant to the provisions of section 92.1 of the *Labour Relations Act*. The applicant seeks interim relief pending the disposition of two related applications, a complaint of unfair labour practice (also referred to as "the section 91 complaint"), and a complaint concerning work assignment (also referred to as "the section 93 complaint").

2. After hearing and considering the submissions of the parties and reviewing the materials

filed in this application, the Board ruled orally on January 19, 1995 to dismiss the request for interim relief. These are the reasons for that determination.

3. The applicant (also referred to as “the Carpenters”) represents a bargaining unit of employees of Tembec Forest Products (1990) Inc. (now known as Tembec Inc.). In the recognition clause in the most recent collective agreement, the bargaining unit is described as “all employees working at the Planing Mill Division at Mattawa, Ontario...” The IWA-Canada, Local 1-1000 (also referred to as “the IWA”) also represents a bargaining unit of employees of Tembec, which is described in its collective agreement as “all employees of Tembec Forest Products (1990) Inc., Mattawa Sawmill Division, Mattawa, Ontario...” There are about 25 persons in the Carpenters’ bargaining unit and about 100 in that of the IWA.

4. The employees represented by the Carpenters work at the company’s planing mill. Two kilometres away from the planing mill is the sawmill, whose employees are represented by the IWA. The company has recently made a decision to consolidate the operations of the two facilities, and move the operations of the planing mill (essentially one machine and the work associated with it) to a building (known as the “Dimension Plant”) at the sawmill.

5. The effective date of the transition will be on or about January 30th. The company has informed the Carpenters that five employees will remain at the planing mill for the near future, ten employees will be laid off and ten employees will move to the new planing operations in the Dimension Plant. The company takes the position that the ten employees who move to the new planing operations will be covered by the IWA collective agreement. It takes the position that the recognition provisions in the two collective agreements are site-specific and that upon re-location of operations from the planing mill to the sawmill, the Carpenters agreement ceases to apply.

6. The Carpenters take the position that its collective agreement covers all planing operations of the employer, irrespective of the specific location at which the planing work is performed. The IWA takes the same view as the employer, that any operations located at the sawmill facility (which will after January 30 include planing operations previously located at the other facility) are covered by its collective agreement.

7. It appears that certain employees at the Dimension Plant have been engaged in planing work over some number of years, represented by the IWA. The Carpenters assert that they only recently discovered this fact (this is disputed by the IWA, but for the purposes of this decision, we will assume this is true). At present there are about six of these employees. It is anticipated by the company that after January 30th, these six employees will continue to do work in connection with the planing machines, supplemented by ten persons moved from the planing mill.

8. When the Carpenters were informed of the employer’s plans, it filed a grievance, alleging that all planing operations, including the work to be moved from the planing mill to the Dimension Plant, were covered by its collective agreement. This grievance was referred to arbitration, and on January 9th, the parties appeared before an arbitrator who, after hearing submissions on certain preliminary matters, has reserved his decision.

9. The Carpenters filed a complaint of unfair labour practices against the IWA in connection with these events which was dismissed by the Board (differently constituted) on January 10th. On January 12th, this application and the complaints under section 91 and 93 of the Act were made.

10. The parties are all agreed that the proper mechanism through which to resolve at least part of the dispute between them is the section 93 complaint which has been filed, although they obviously differ as to its merits (we say "at least part" since the applicant clearly sees an unfair labour practice element to these events as well). Before the arbitrator, the employer urged a deferral of the arbitration pending the filing and determination of a work assignment complaint to this Board. Before the panel of the Board on January 10th, the IWA agreed to file a section 93 complaint in the absence of one from the Carpenters. The Carpenters have now filed its section 93 complaint. Certainly, it appears to the Board that the parties would all benefit from an expeditious resolution of that matter. The employer and the IWA have agreed, in order to facilitate that end and since it is clear that the section 91 and section 93 complaints will be listed for hearing together, to abridge the time for filing their responses on the section 91 complaint. The consultation with respect to the section 93 complaint has now been scheduled to take place starting on February 7, 1995.

11. In this application the applicant has requested, on an interim basis, (a) an order that the employer be prohibited from relocating the operations of the planing mill to the Dimension Plant and (b) in the alternative, an order that all work in connection with planing (including any work previously done by members of the IWA) be assigned to members of the Carpenters.

12. The Board has developed its approach with respect to interim relief applications over a number of decisions, and it is unnecessary to review these in detail. In *J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145 the Board stated:

13. In the Board's previous cases dealing with interim orders, the Board has discussed the place of interim relief in the context of alleged unfair labour practices: see, for example, *810048 Ontario Limited c.o.b. as Loeb Highland*, [1993] OLRB Rep. March 197; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. (unreported). The Board has said that interim relief is warranted where it may serve to "neutralize the potential impact of an *alleged* unfair labour practice" (see *Tate Andale Canada Inc.*), preserve the right of the union to a meaningful remedy should the complaint be upheld (see *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 342) or preserve a "status quo" in order to provide some stability within which litigation over labour relations disputes may proceed (see *New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited*, [1993] OLRB Rep. Aug. 783).

14. Within this context, the Board's determinations under section 92.1 involve applying a two-step inquiry. Firstly, the Board assesses, on the basis of the materials before it, whether there is any apparent merit to the complaint which forms the basis for the request for interim relief. In this assessment, the Board in no way makes a finding or determination as to the *actual* merits of the complaint - that is for the panel which hears the complaint to decide. Rather, the Board takes a preliminary view of the matter in order to assess whether, assuming that the facts relied upon by the applicant are true, the applicant has shown an arguable case for the relief sought in the main complaint.

...

17. The second assessment that I must make is whether assuming the applicant has shown an arguable case, the harm in not granting interim relief outweighs the harm of granting it, such that it would be more consistent with the purposes of the Act, the exercise of the rights under the Act, and the purposes of interim relief, to grant the orders requested.

13. In the section 91 complaint, the Carpenters allege that the company is in violation of sections 65 and 68(1) of the Act in transferring the planing operations from the planing mill to the

Dimension Plant and assigning the work under the IWA collective agreement. In support of this allegation, the union sets out, among other things, the history of its bargaining rights, and the practice of the employer in the performance of planing work. Nowhere is it alleged that the company is acting with an improper motive in undertaking this transfer of its operations. Indeed, the remedy requested in the section 91 complaint is not a prohibition of the transfer, but essentially, an order that the work in dispute in the section 93 application be assigned to members of the Carpenters.

14. In these circumstances, whether or not the section 91 case meets an “arguable case” standard, it is evident that the real dispute between the parties relates to the proposed assignment of work. Ultimately, as is evident from the remedial request in the section 91 complaint, the Carpenters are not concerned about *where* the planing operations take place - they simply wish to preserve their claim that the work falls under their collective agreement. Indeed, in submissions, counsel for the Carpenters states that the Carpenters do not question this employer’s right to make determinations about the most efficient manner of running its operations, and this is why they have not sought any permanent prohibition of the transfer of operations. This supports our assessment of the nature of the conflict facing these parties. To the extent that the real dispute is a contest between the Carpenters and the IWA over the work to be re-located, we find it appropriate to assess the merits of the interim relief application in the context of that dispute. If there is any merit to the section 91, we see it as only an adjunct to the main concerns of these parties.

15. We therefore turn to a consideration of the request for interim relief against the context of the section 93 application. We are satisfied on a review of the material before us and the submissions of the parties, that there is an arguable case that the Carpenters ought to be assigned the planing work in the Dimension Plant. Clearly, the determination of the work assignment dispute will have to have regard to the dispute between the parties over the interpretation of the recognition clauses of both collective agreements. There may also be a dispute as to the past practice of this employer. But these are matters which another panel will have to weigh and assess. For our purposes, we are satisfied that there is sufficient apparent merit to this application for the purposes of providing a basis for interim relief.

16. However, we are not convinced that the balance of harm favours the applicant on either of the two alternative interim orders sought. The first is the request to prohibit the employer from moving the planing operations pending the main application. As we have indicated above, the applicant does not challenge the employer’s right to transfer the operations in the main application. It simply seeks to ensure that its bargaining rights follow the move. In this context, what is being sought is a *deferral* of the move. The applicant has not shown any reasons why it will be prejudiced by the transfer taking place as planned, instead of at the completion of the main application. On the other hand, the employer has entered into certain commercial commitments which may be jeopardized by any delay.

17. The second alternative, interim order requested is that the Board order the assignment of the work in dispute in the section 93 application to the members of the Carpenters. We begin our consideration of this with the comment that the nature of a typical work assignment dispute is quite different from most other conflicts which come before the Board. Where one side wins by “gaining” some work, the other side correspondingly loses the same work. It is difficult to see how the harm or prejudice that one side suffers by not having the work until the merits of a section 93 application are determined, outweighs the harm or prejudice to the other side if the work were re-assigned by the Board on an interim basis.

18. In this case, the applicant relied on the Board’s decision in *Sayers & Associates Limited*, Board File No. 0068-91-G decision dated August 29, 1994, unreported, to say that there is a possi-

bility that even if it eventually succeeds on the section 93 application, its members may never recover the financial loss they have suffered by wrongfully being deprived of the work in the interim. However, it acknowledges that the same would hold true for the members of the IWA if the Board were to grant the interim relief requested and order a re-assignment of the work from members of the IWA to members of the Carpenters.

19. The applicant does not ultimately characterize its submissions as going to a “balance of harm” test. Rather, the applicant asserts that in a context of a disputed work assignment, the Board’s task in an application for interim relief should be to maintain the “status quo” pending the hearing of the merits. In this case, the status quo is that the parties have generally understood the Carpenters’ bargaining rights to extend to the planing operations of the employer, and the IWA bargaining rights to extend to the sawmill operations. It would be in keeping with the status quo for the Board to order that all planing operations at the Dimension Plant will be performed by members of the Carpenters on an interim basis.

20. The other parties agree with the general proposition that the Board ought to look to the status quo (although, as indicated above, the employer takes issue with the Board’s application of section 92.1 to a work assignment dispute). However, they vigorously disagree with the applicant about what the status quo entails.

21. We do not find that appeals to the status quo assist the applicant in this case. First, in this particular context, the manner in which each union characterizes the status quo cannot be separated from its view on the merits of the section 93 application, for their references to the status quo are based on their views of their historical claims to the work in question. For the Board as well, this is a reason why this concept has limited utility in the present circumstances, since those are precisely the types of issues that will be determined in the main application. Second, the Board’s references in decisions on interim relief to preserving the status quo are based on broader labour relations concerns. The status quo does not have independent value in itself. The Board may intervene to preserve a status quo because in doing so, it protects the exercise of rights under the Act, or provides labour relations stability. In the case before us, it is not clear that intervening on an interim basis will further those goals any more than not intervening. Indeed, it may very well be that the nature of many work assignment disputes is such that they are unlikely to give rise to the sorts of problems which the Board has sought to address in those cases where it has provided interim relief under section 92.1.

22. The company takes the position in any event that the Board cannot, because of the presence of section 93(8) of the Act, apply section 92.1 to work assignment disputes. Section 93(8) states:

93.- (8) Where a complaint is made under sub-section (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers’ organization, trade union or council of trade unions that in its opinion is concerned, make an interim order with respect to the assignment of the work that it in its discretion considers proper.

23. The company states that because section 93(8) provides a mechanism for an interim assignment of work in a pending work assignment proceeding, the Board’s powers to order interim relief under section 92.1 do not apply here. The Board has no jurisdiction, in other words, outside of section 93(8), to order interim relief in a pending section 93 application. It is not apparent to us that section 92.1 is unavailable here. Certainly, the language of section 92.1 is very broad and pertains to any proceedings under the Act. We do not have to determine this issue, however, since we have decided in any event that no relief is warranted.

24. For these reasons, the Board dismissed the application for interim relief.
-

2393-94-R Ontario Public Service Employees Union, Applicant v. The Governing Council of the University of Toronto, Responding Party v. International Union, United Plant Guard Workers of America, Local 1962, Intervenor

Certification - Pre-Hearing Vote - Timeliness - Board concluding that Social Contract Act not rendering raiding union's application for certification untimely - Board directing that ballots cast in representation vote be counted

BEFORE: *Paula Knopf*, Vice-Chair, and Board Members *J. A. Rundle* and *K. Davies*.

APPEARANCES: *Chris Dassios*, *Ed Ogibowski* and *Connie Hoosiuk* for the applicant; *John E. Brooks*, *Brian Marshall* and *Verugun Ghanaghian* for the responding party; *Joshua S. Phillips* and *Watson Cook* for the intervenor.

DECISION OF THE BOARD; January 11, 1995

1. This is an application for certification in which a pre-hearing vote was requested. The Ontario Public Service Employees Union (OPSEU) wishes to displace the International Union of United Plant Guard Workers of America Amalgamated Local 1962 (the Plant Guards Union) as the bargaining for all police officers employed by the University of Toronto (hereinafter referred to as the employer). The Board (differently constituted) directed the taking of a pre-hearing representation vote in a decision dated October 24, 1994. The vote was conducted and the ballot box was sealed.

2. There is no dispute over the bargaining unit description. The only issue in dispute between the parties is the timeliness of the application. The parties agree that under the *Labour Relations Act*, the application would be timely. The issue to be determined is whether the provisions of the *Social Contract Act* S.O. 1993 c.5 would have the effect of rendering this application untimely or inoperative.

3. The facts are not in dispute. The employer entered into a collective agreement with the Plant Guards Union on October 17, 1991. The duration of that collective agreement was set to be from October 17, 1991 to November 30, 1993. The collective agreement provided for automatic renewal for periods of one year unless notice was given by either party of a desire to amend or terminate the collective agreement. As a result of the passage of the *Social Contract Act* in July of 1993, the Plant Guards Union and the employer entered into a local agreement on July 29, 1993 pursuant to the applicable sectorial agreement under the *Social Contract Act*. That local agreement acknowledged the existence of the parties' collective agreement and provided for the collective agreement's extension until March 31, 1996. This provisions reads:

Pursuant to section 35 of the *Social Contract Act*, 1993, the collective agreement which exist between the Union and the University and which expires November 30, 1993 will be extended until March 31, 1996.

In effect, the collective agreement was given a 4½ year term as a result of the local agreement under the *Social Contract Act*.

4. On October 7, 1994, OPSEU filed this application for certification seeking bargaining rights for the employees who are covered by the collective agreement between the plant guards and the employer. This application falls squarely within the "open period" contemplated by section 5(5) of the *Labour Relations Act* which provides:

5. (5) Where a collective agreement is for a term of more than three years, a trade union may, subject to section 62, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be.

Section 57(1) of the *Labour Relations Act* provides:

57.-(1) If the trade union that applies for certification under subsection 5 (4), (5) or (6) is certified as bargaining agent for any of the employees in the bargaining unit defined in the collective agreement, the trade union that was or is a party to the agreement, as the case may be, forthwith ceases to represent the employees in the bargaining unit determined in the certificate and the agreement ceases to operate in so far as it affects such employees.

The *Social Contract Act* provides:

Purposes

1. The purposes of this Act are as follows:

1. To encourage employers, bargaining agents and employees to achieve savings through agreements at the sectorial and local levels primarily through adjustments in compensation arrangements.

• • •

7.-(1) The Minister shall establish expenditure reduction targets for sectors and for employers.

(2) If there is a sectoral framework in respect of a sector, the Minister shall establish lower expenditure reduction targets for every employer in the sector who,

- (a) enters into a local agreement, not later than August 1, 1993, that implements the sectoral framework; or
- (b) implements a non-bargaining unit plan, not later than August 1, 1993, that implements the sectoral framework.

35.-(1) A bargaining agent may, by written notice to the employer of employees to whom this Part applied, require that a collective agreement be extended to March 31, 1996 if the agreement was or is governed by an Act that permits the employees to strike.

52. The provisions of this Act and the regulations prevail over the provisions of any other Act and the regulations thereunder but only to the extent necessary to carry out the intent and purposes of this Act.

The argument of the parties

5. Counsel for OPSEU places great reliance on the Ontario Labour Relations Board's previous decisions in the *Corporation of the City of Scarborough*, (unreported decision dated March 1, 1994) [now reported at [1994] OLRB Rep. Mar. 300] and *Ottawa Board of Education*, (unreported decision dated August 17, 1994) [now reported at [1994] OLRB Rep. Aug. 1024]. It was argued that these cases stand for the proposition that nothing in the *Social Contract Act* has taken away the rights of employees to seek representation through another union during the "open periods" under the *Labour Relations Act*. It was argued that this application should run the normal course whereby if the application succeeds, the bargaining rights of the Plant Guards Union would be terminated and the collective agreement with the employer would cease to operate pursuant to section 57 of the *Labour Relations Act*. Counsel for OPSEU suggested that this would not necessarily affect the purposes and intentions under the *Social Contract Act* and that the application should therefore be allowed.

6. Counsel for the employer stated that the University was taking no position on the question of timeliness of the application. However it was doing this without prejudice to any position or rights it may wish to assert depending on how the application is determined with regard to the Local Agreement. Further, it was pointed out that the employer has grave concerns about any result that would alter or affect the Local Agreement covering the employees in the intended bargaining unit and this employer. It was said that nothing in this application should change any rights or positions under that Local Agreement. However, the employer also added that it was not appropriate or necessary for this panel of the Board to decide that issue at this time.

7. Counsel for the intervenor began his submissions by agreeing that, in the normal course, this application would be timely because it fell within the "open period" under section 5(5) of the *Labour Relations Act*. However, it was argued that the effect of section 52 of the *Social Contract Act* is that this certification application ought not to be allowed to proceed. It was argued that if this applicant was allowed to be certified, a conflict between the *Labour Relations Act* and the *Social Contract Act* would be created by putting in jeopardy the Local Agreement. It was submitted that the intent of the *Social Contract Act* is to give extended protection to bargaining agents who have been disadvantaged by the *Social Contract Act* by giving bargaining agents the unilateral right to extend the terms of collective agreements under section 35 of the *Social Contract Act*. Further, since one of the stated purposes of the *Social Contract Act* is "to encourage employers, bargaining agents and employees to achieve savings through agreements at the ... sectorial and local levels primarily through adjustments and compensation arrangements", (section 1.1), it was argued that one of the prime purposes of the *Social Contract Act* is to encourage and preserve negotiated local agreements between employers and bargaining units. It was argued that the effect of certifying OPSEU would be that the Local Agreement between this employer and the Plant Guards Union would be destroyed and nothing in the *Social Contract Act* would allow OPSEU to create a new local agreement with this employer. This is so because the *Social Contract Act* explicitly requires the local agreements must to be "entered" not later than August 1, 1993 (section 13(1)). It was argued that section 57(1) of the *Labour Relations Act* requires that the collective agreement between the Plant Guards Union and this employer would cease to operate upon certification of OPSEU. Therefore, a conflict is created between the *Social Contract Act* and the *Labour Relations Act* because the *Social Contract Act* mandates the local agreement to continue to operate and the *Labour Relations Act* mandates that the collective agreement cease to operate. It was submitted that in the case of such a conflict, the *Social Contract Act* must prevail. It was argued that the decision in the *Ottawa Board of Education*, *supra*, was incorrect and ought not to be followed because it did not recognize the potential conflict and it was said to have read the "intent and purposes" of the *Social Contract Act* too narrowly. It was stressed that the *Social Contract Act* has

taken away many rights from the bargaining agent that it must be read to provide protection to incumbent bargaining agents during the life of local agreements. Further, stressing the effects and problems that would arise if this application were to succeed, counsel for the Plant Guards Union pointed out that both the employer and the employees in this bargaining unit have benefited from the Local Agreement in that it has given them the advantage of reduced expenditure targets. In addition, the Local Agreement gave some benefits to the individual employees. It was argued that if this Local Agreement ceases to operate because of the effects of section 57(1) of the *Labour Relations Act*, the employer and the employees covered by that Local Agreement would be significantly disadvantaged. It is stressed that nothing in the *Social Contract Act* allows for the assignment of a Local Agreement to another bargaining agent and there is no provision for successorship rights under the *Social Contract Act*. This was said to be indicative of the fact that the *Social Contract Act* contemplates that incumbent unions will remain as bargaining agents throughout the life of the Local Agreement. It was stressed that the only way one could avoid the potential of the employer losing the benefits of the reduction targets and the employees losing the benefits of what they negotiated in the local agreement would be to allow the *Social Contract Act* and its protection of local agreements to prevail over the *Labour Relations Act*.

8. In reply, counsel for OPSEU argued that nothing in the *Social Contract Act* says that the Local Agreement would come to an end if representation rights changed. Acknowledging that OPSEU could make no undertakings as to what position it would take with this employer regarding the terms of the Local Agreement, counsel for OPSEU did say that this Board ought not to be swayed by any "hypothetical horrors" that the Plant Guards were trying to suggest. Instead, counsel for OPSEU suggested that many of the perceived or potential difficulties may well be able to be worked out between the parties and these potentialities ought not to affect how the *Labour Relations Act* ought to be read. Further, it was argued that nothing in the *Social Contract Act* says or should be read to say that employees cannot change bargaining agents during the term of operation of the *Social Contract Act* or suggests that representation rights have been overridden.

9. After hearing this exchange of positions by the two unions, counsel for the employer took the position that if the result of this case may be that the Local Agreement ceases to operate, then there may be a conflict between the *Labour Relations Act* and the *Social Contract Act*. Further, counsel for the Plant Guards concluded by saying that if the local agreement ceases to operate, the government has to be considered as a player in this scenario because it may decide that the expenditure reduction targets will have to be altered if the Local Agreement ceases to operate.

The Decision

10. The effect of the *Social Contract Act* upon the timeliness of a certification application was first dealt with by this Board in the *Corporation of the City of Scarborough, supra*. In that case, the employer and the incumbent union were operating under the fail-safe provisions of the Part VII of the *Social Contract Act*. Their collective agreement was extended by virtue of the union triggering the provisions of section 35(1) of the *Social Contract Act* after the other union's certification application was filed. The application for certification was filed in compliance with the time limits of the *Labour Relations Act* and was challenged as untimely by the incumbent union. The Board noted that the certification application was timely when it was filed. The Board rejected the argument that the *Social Contract Act* could have the effect of closing the open period retroactively so as to invalidate an otherwise valid application. In a concurring opinion, panel Member Wightman wrote:

Section 52 of the *Social contract Act* states that its provisions takes [sic] precedent over other statutes, "but only to the extent necessary to carry out the intent and purposes of this Act". The purposes of the *Social Contract Act* are expressly set out in section 1 of the statute and relate,

generally, to expenditure reduction and control. They do not include, and can be carried out without, insulating trade unions or employers from the fundamental right of employees to express their views on trade union representation. Accordingly, I would have dismissed the intervenor's allegations for the further reason that the *Social Contract Act* does not purport to take precedent over employee representation rights set out in the *Labour Relations Act*.

11. This addendum was endorsed in the subsequent decision concerning the *Ottawa Board of Education*, *supra*, at paragraph 11. That case also involved an incumbent union an employer who also were in fail-safe under the *Social Contract Act*. Again, the issue for determination was the effect of the operation of an extended collective agreement under section 35 of the *Social Contract Act* upon the timeliness of an application for certification under the *Labour Relations Act*. The Board considered arguments very similar to the ones presented in this case. The Board concluded that when a union gives notice under section 35 of the *Social Contract Act* requiring the collective agreement to be extended to March 31, 1996, it is effectively exercising the unilateral option of extending the life of the collective agreement up to March 31, 1996. It was noted at paragraphs 14 and 15:

14. The scheme of the *Labour Relations Act* places considerable significance for employees and trade unions on the duration of collective agreements. By permitting a bargaining agent to unilaterally extend the term of a collective agreement the Legislature was undoubtedly aware of the significance of such a step.

15. ... The *SCA*, given CUPE's notice to extend, determined what the term of the collective agreement would be. Other than assuring that collective agreements are for a term of at least one year, the *Labour Relations Act* does not generally dictate the duration of collective agreements. The *Labour Relations Act* however does provide for periods of time, given the duration of particular collective agreements, for employees to make decisions affecting their bargaining agent. With the *SCA* affecting the duration of a collective agreement and with the *Labour Relations Act* generally providing for "open periods", it is difficult to see where in this instance there is a conflict between the provisions of the two statutes....

In the facts of the *Ottawa Board of Education* case, the *Social Contract Act* extension of the collective agreement rendered the certification application by the other union untimely. But the importance of that decision is that it holds that a collective agreement extended by the operation or triggering mechanism of section 35 of the *Social Contract Act* means that the term of the extended collective agreement becomes the defining term for purposes of computing the open period under section 5 of the *Labour Relations Act*. Having determined this, the *Ottawa Board of Education* case goes further and explores the question of when an extended collective agreement can become "open". At paragraph 16 it is said:

16. ... Subsection 5(4) of the *Labour Relations Act* provides that for a collective agreement of a period longer than 3 years the "open period" would occur during the 35th and 36th months. If a displacement application was filed during the 35th and 36th month, and was successful, it is not entirely clear that a conflict would exist between the provisions of the *SCA* and the *Labour Relations Act* which would cause one not to give effect to the "open period". However, even if a conflict exists as argued by counsel for the Ottawa Board given that section 57(1) would provide for the cessation of the extended collective agreement, the mere existence of a conflict between the statutes does not mean that the *SCA* will prevail. As section 52 indicates, the *SCA* will prevail only to the extent necessary to carry out the intent and purposes of the *SCA*. The purpose clause of the *SCA* makes it quite clear that the purpose of the *SCA* is to reduce the deficit and there is no indication in the statute either explicitly or implicitly that one of the purposes of the *SCA* is to protect bargaining agents from displacement or termination applications. If the intention of the Legislature was to provide such protection for bargaining agents one would have thought that such an intention would have been expressed quite clearly. Even if the provisions of the two statutes conflict during the period of the 35th and 36th months of the extended collective agreement, the *SCA* provision would not prevail since removing the right of employees to change their bargaining agent is not necessary to carry out the intent and purposes of the *SCA*.

This quotation affirms that concept that there is nothing in the *Social Contract Act* that can be read to protect the representation rights of a bargaining agent or shield them from displacement applications during the operation of the *Social Contract Act*.

12. Having seen how the Board has addressed the timeliness question in two cases dealing with parties operating under Part VII or the “fail-safe” provisions of the *Social Contract Act*, we must turn to the different facts in the case at hand. The parties involved in this case are not operating under fail-safe. Part VII of the *Social Contract Act* has no application if the plant guards and the employer simply chose to enter into the local agreement that complies with section 4 of the *Social Contract Act* and to extend their collective agreement. The effect of this local agreement was not just to extend the duration, but also to amend the terms of the collective agreement. The signing of the Local Agreement also positions these parties for the lower expenditure reduction targets under Part II of the *Social Contract Act*.

13. The question then arises is to whether the fact that the parties to this dispute were not operating under the fail-safe provisions of the *Social Contract Act* distinguishes this case from the analysis in the *Scarborough* and *Ottawa* cases. We start by affirming and adopting the reasoning found in those decisions. However the different facts in this case means that further analysis is required.

14. In the *Ottawa* and *Scarborough* cases, the facts disclosed no conflict between the operation of the *Social Contract Act* and the *Labour Relations Act*. It was even suggested in the *Ottawa* case that if a problem did arise, the *Labour Relations Act* representation right provisions would prevail because a denial of such rights would not be necessary to carry out the intent and purposes of the *Social Contract Act*. However, in the case at hand, a potential conflict has been identified or suggested by the Plant Guards Union.

15. If the application for certification is to succeed, section 57(1) of the *Labour Relations Act* provides that the collective agreement between the Plant Guards and the employer “ceases to operate” so far as it affects these employees. Further, the local agreement, which is a contract between the Plant Guards and the employer, would be a contract between this employer and a union which no longer has representation rights over those employees. What would be the affect of such situation on the Local Agreement? How could it be enforced? How would it affect the expenditure reduction targets? If it is rendered inoperative by virtue of a timely application under section 5(5) of the *Labour Relations Act*, what effect would this have on the University’s funding source and Social Contract expenditure reduction targets under Part II of the *Social Contract Act*? How could the intent and purposes of the *Social Contract Act*, which is clearly aimed at the reduction of the deficit, be carried out without conflicting with the *Labour Relations Act* primary purpose of ensuring “that workers can freely exercise the right to organize by protecting the rights of employees to choose, join or be represented by a trade union of their choice”? (section 2.1(1) of the *Labour Relations Act*).

16. These are but a few questions raised by this important and difficult case. The answers are not clear. They all cannot and should not be answered in the abstract in this case. The reason for the lack of clarity comes from the difficulties of applying the *Social Contract Act* to the traditional and basic concepts of labour relations that are codified in the *Labour Relations Act*. To put it bluntly, the *Social Contract Act* has shattered many of the corner stones of collective bargaining and the parties’ understanding of a collective agreement. Before the *Social Contract Act*, a collective agreement’s terms and duration were sacrosanct during the period of time agreed to by the parties with the only vulnerable point being the “open period” under the *Labour Relations Act*. The *Social Contract Act* has changed the sanctity of the terms of the collective agreement by open-

ing up those contracts for amendments and reductions. Despite this, collective bargaining can remain strong and possible under the *Social Contract Act*. But it cannot be ignored that the structure of collective agreements are and will remain shaky until their cornerstones are buttressed and restored by the passage of time in the expiry of the *Social Contract Act*. In the meantime, the parties in this Board must attempt to fathom how the *Social Contract Act* operates in conjunction with or overrides the *Labour Relations Act*.

17. One way to approach this case is to ask “What in the *Social Contract Act* would render this application for certification ineffective?” This is critical because, but for the issue of the *Social Contract Act*, the parties all agree that this application is timely under the *Labour Relations Act*. There is nothing in the *Social Contract Act* that specifically protects the representation rights of existing bargaining agents. One can argue that it would be a logical and fair premise that the Act was intended to give bargaining agents such protection in exchange for their loss of effective bargaining power or ability to exercise representation rights during the operation of the *Social Contract Act*. However, one looks in vain for explicit evidence or indication of such an intention. Section 35 does give a bargaining agent in fail-safe the exclusive right to extend the collective agreement. But that alone cannot be read as a protection of representation status because even under the *Labour Relations Act*, a long term collective agreement gives no representation guarantee to the incumbent union because it is still open to the challenges during the open periods defined in the *Labour Relations Act*. Further, it would be a curious result to have union in fail-safe attaining protected status that unions able to negotiate local agreements may not have. Further, the labour relations scheme in this Province does allow for industrial peace during the term of the collective agreement. But it does not guarantee that a union would be protected from challenges to its right to represent the employees or that employers will be secure in the knowledge that the collective agreement with the incumbent union will be able to run its expected course. If the *Social Contract Act* intended to alter this basic concept of organizational and representation rights, one would expect clear and unambiguous language to that effect. There is no explicit or implicit language of that kind to be found in the *Social Contract Act*.

18. We are not ignoring the fact that the *Social Contract Act* does include as a stated purpose “to encourage employers, bargaining agents and employees to achieve savings through agreement at the sectorial and local levels.” This could well be read with section 52 of the *Social Contract Act* to mean that the provisions of that Act which created the mechanism of the Local Agreement should be read to override anything in the *Labour Relations Act* that would defeat the intentions of the deficit reductions in the *Social contract Act*. There is no question that the entire scheme of the *Social Contract Act* is designed to encourage parties to enter into Local Agreements, to protect those Local Agreements and to achieve cost savings. But does this mean that any other statutory right, no matter how fundamental, must fall way in deference to those laudable goals? The question cannot be answered in the abstract. If the question is superimposed upon the facts of this case, one is forced to ask whether the *Social Contract Act* creation of the concept of the Local Agreement means that employees covered by a Local Agreement have effectively lost the right to change bargaining agents during the term of that agreement. One could argue that the Legislature may have done this in order to preserve the operation of the Local Agreement. However, this would be inconsistent with the Act as a whole and in particular Part VII of the *Social Contract Act* that deals with Plans that apply to non-bargaining unit employees. No one suggests that the *Social Contract Act* has taken away employees rights to organize and the union’s right to gain certification during the operation of the *Social Contract Act* with regard to employees who were not previously organized. When and if certification is granted in those cases subsequent bargaining and/or first contract arbitrations could well impact upon the operation of Plans under Part VII in ways that are yet to be determined. What is clear is that the rights to gain certification and thereby impact upon the *status quo* still exist under the *Social Contract Act*.

19. Where the *Social Contract Act* is intended to prevail over specific statutory rights, it is clearly spelled out. Section 15(1) of the *Social Contract Act* states that the provisions of the collective agreement that apply to employees prevail over other Acts and regulations that relate to holidays, vacations, hours of work and overtime. Section 15(1) of the *Social Contract Act* does not state that the Local Agreements prevail over other statutory rights such as representation and organizational rights under the *Labour Relations Act*. This leaves the question of the potential undoing of the Local Agreement and whether this would put this application in conflict with the *Social Contract Act*. It may well be that if this application for certification is to succeed, OPSEU could decide to opt into the terms of the current local agreement covering the people in the proposed bargaining unit and/or that the employer would assert that OPSEU would be barred from seeking any other terms and conditions of employment for these employees so that the expenditure reduction targets are not jeopardized. In these ways, the interest of the *Social Contract Act* could be carried out without impeding upon the representation rights of the employees under the *Labour Relations Act*. But again, these questions cannot be answered in the abstract and they have to be left to a subsequent forum for resolution.

20. But the fact that such difficult questions are raised by this case does not dictate that the result must be fashioned to avoid such difficulties. The difficulties created by the *Social Contract Act* are being unmasked daily. The difficulties cannot be avoided by simply holding that the *Social Contract Act* prevails over anything that potentially affects the parties. The *Social Contract Act* does not require this. It only requires that its provisions prevail only to the extent necessary to carry out its purposes and intent.

21. In the case at hand, there is a potential of jeopardizing the fiscal planning evidenced in Local Agreement between the Plant Guards and this employer. But that potential has not yet been realized and can be avoided. On the other hand, the *Labour Relations Act* explicitly allows for employees to apply to change their bargaining agents during the open periods in term of the collective agreement. This application was filed in a timely manner under the *Labour Relations Act*. Nothing in the *Social Contract Act* or the *Labour Relations Act* protects bargaining agents or employers from challenging the *status quo* during the open periods defined in the *Labour Relations Act*. To read the *Social Contract Act* as creating an inviolable status for bargaining agents and employers during the term of a Local Agreement and/or during "Fail-Safe" would require a reading into the *Social Contract Act* a fundamental alteration of labour relations concepts in this Province without any specific language to support such a change. If the Legislature intended such a result, one would expect it to be defined, and not left to be implied.

22. We are mindful of the disruption this conclusion could have on the fiscal planning of any employer who is expected to be free of collective bargaining obligations during the life of an extended collective agreement and who felt confident about engaging upon budgetary projections based on a collective agreement with the incumbent union. However, the inevitable disruption resulting from such a conclusion is no different than the result of any successful application under section 5(5) of the *Labour Relations Act* without having consideration to the *Social Contract Act*. So again, the difficulties resulting are not unprecedented or unusual under the current scheme of labour relations in this Province. They are one of the checks, balances and prices to be paid for the rights and obligations created by the labour relations legislation.

23. The function of this Board is not to try to find the least difficult solution for the parties. Instead it is to interpret and apply the *Labour Relations Act* in conjunction with the other relevant statutory provisions governing the parties before us. The case at hand explores some of the difficulties of rationalizing two sets of legislative directions. However, given the scheme of both Acts, we have concluded that nothing in the *Social Contract Act* renders this application for certification

either untimely or inoperative no matter what difficulties may possibly arise in the future between the applicant union, the employer and the employees covered by the local agreement. We are confident that those difficulties can be resolved by sound labour relations and common sense. If they cannot, they must be resolved in another forum. In such a venue, the provisions of the *Social Contract Act* will prevail in the event of conflict if that is necessary to protect the purposes of the *Social Contract Act*. But sound labour relations should be able to avoid the exception of such a conflict.

24. Therefore the Board directs that the ballots cast in the representation vote be counted. The matter is referred to the Registrar.

2830-94-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Versa Services Ltd.**, Responding Party v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414; Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees Local Union No. 647, Intervenors

Certification - Charges - Intimidation and Coercion - Membership Evidence - Employer alleging that membership evidence collected through threats to employees' job security by former supervisor at workplace - Board not convinced that former supervisor's encouragement of unionization casting doubt on voluntariness of membership evidence submitted - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair.

APPEARANCES: *Lisa Kelly, Tamara Heller, Maureen Kirincic and Tom Rooke* for the applicant; *Michael Horan, Robert Rochkin and Oliver Zeidler* for the responding party.

DECISION OF THE BOARD; January 17, 1995

1. This is an application for certification. A hearing was scheduled into this application, initially to hear allegations raised by the employer with respect to the union's organizing drive. During the course of the proceedings, other issues arose, relating to a change in name of the applicant. Ultimately, some of these issues were resolved between the parties. On January 9, 1995, the Board heard the evidence concerning the allegations raised by the employer, and the parties' arguments as to the disposition of this application. It is the employer's position that despite the level of membership support as demonstrated by the membership cards filed in support of this application, the Board should order a representation vote because of the circumstances of the organizing drive and because of the errors in the documents relied on by the union in this application.

2. On the application form, the applicant is shown as "National Automobile, Aerospace and Agricultural Workers Union of Canada (CAW-Canada)". It is not in dispute that because of a clerical error, the word "Implement" was omitted from the title of the applicant. Accordingly, the title of proceedings has been amended, by the previous panel of the Board dealing with this application, to show the applicant's name as "National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)".

3. By its decision of December 16, 1994, the previous panel also directed the union to lead

evidence to establish the appropriateness of a certificate issuing in the new name of the applicant, which does not appear on the membership cards (nor is it the name appearing on the application).

4. Between December 16th and the date that the parties appeared before this panel, the parties resolved certain issues. The applicant has filed documents relating to its change of name, which are not in dispute. The parties are agreed that the union known as the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("the old name") changed its name to the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("the new name") at a convention held in Quebec City between August 23 and August 26, 1994, and that the change of name took place in accordance with the provisions of the governing Constitution of the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada). It is also agreed that the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) is a trade union within the meaning of the *Labour Relations Act*.

5. For ease of reference, the Board will use the term "CAW-Canada" to refer to the union which is the applicant in these proceedings, whether under the old name or the new name. At the hearing, counsel for the employer agreed that if a certificate is ultimately issued in this application, it ought to bear the new name of the CAW-Canada.

6. The employer's allegations concerning the union's organizing drive centre on the activities of a former supervisor at the workplace, Gail Tuck. The employer's position is that Ms. Tuck, acting on behalf of the union, used intimidation and coercion to convince employees to join the applicant.

7. The Board heard the evidence of three witnesses called by the employer in support of its allegations. The union called no evidence. It is to be noted that certain portions of the evidence called by the employer was hearsay in nature. Most of it was not objected to, nor was it contradicted. Although the Board recognizes the limitations on the reliability of hearsay evidence, I am nevertheless prepared to assume its accuracy for the purposes of this case, since ultimately it does not affect my determination.

8. The employees affected by this application work in a cafeteria at the Toyota plant in Cambridge, in food service preparation and related functions. The employer (also referred to herein as "Versa") also operates at other locations in Cambridge. The on-site supervisor at the Toyota plant until October 21, 1994 was Gail Tuck. Versa has other management personnel who also visit the Toyota site from time to time.

9. On or around October 3, 1994, the cook at the Toyota cafeteria was transferred by Versa to another location. Gail Tuck became very concerned about her own position. It appeared that she felt under pressure from management at Versa and felt that they were unhappy with her performance. It became her assumption quite quickly that she would also be transferred out of the Toyota cafeteria. This assumption was shared by other employees of Versa.

10. One person with whom Ms. Tuck shared her fears was Blanche Vokes. Ms. Vokes had a good relationship with Ms. Tuck, and considered themselves friends. On a number of occasions between October 3rd and October 21st, Ms. Tuck called Ms. Vokes into her office to discuss her situation. It was Ms. Vokes who first ventured the opinion to Ms. Tuck that "it looks like you're next". During these conversations, Ms. Tuck made statements to Ms. Vokes such as: "they've gotten rid of Molly [the cook], they're going to get rid of me, and you guys should organize to protect yourselves, or they'll be getting rid of all of you".

11. Ms. Tuck also stated her opinion that the Versa management would put the employees on rotating shifts. She mentioned that in some cafeterias run by Versa, some cashiers are used only during the lunch time. Ms. Tuck stated that the employees needed to form a union. She told Ms. Vokes that she should call employees at other cafeterias and find out how to get a union.

12. The scenarios that Ms. Tuck put forward became the topic of conversation amongst the employees at Versa. Employees became worried about possible changes to their work, particularly the prospect of changes to the shifts, cuts in hours, or job losses. Ms. Vokes stated that the employees were "all scared to death" and "panicked" about how they could arrange their lives around two shifts.

13. Ms. Tuck found out on October 19th that she was to be transferred from the Toyota cafeteria. By Monday, October 24, she was no longer at this location. A day or two before she left, she spoke to a number of employees who were on a coffee break. She implied that the new management who would take her place would not be as sympathetic as her. She stated that the first thing that would be done would be to put the employees on rotating shifts and cut back on employees' hours. Ms. Tuck also called some of the employees at home in the evening with some of the same comments. Among other things, she stated to Ms. Vokes during one of these phone calls that the people who were taking her and the cook's place at Toyota would want to put their people in the Toyota cafeteria, and that anyone who was loyal to Ms. Tuck would be "out".

14. After employees found out about the imminent transfer of Ms. Tuck, they began to discuss the possibility of unionizing. One of the topics of discussion was the general impression employees held that if they unionized, Toyota would end its contract with Versa and the employees would all be out of jobs. Employees questioned whether or not this was true. There was some discussion about the labour laws and how they would protect employees even if Toyota ended its contract with Versa. There was also discussion about the wages at unionized cafeterias, which employees understood to be higher than their wages. Ms. Vokes expressed the opinion that she thought the idea of a union was Ms. Tuck's way of getting back at Versa because she was angry at the company. Ms. Vokes thought that the employees should wait to see what the new management was like.

15. One of the employees decided to contact the applicant, who was known to her because her husband is represented by the CAW-Canada in another workplace. A meeting was arranged, which was held on or about October 26th. Ms. Vokes declined to attend.

16. One of the persons testifying, Cheryl Dornhoefer, is not an employee in the bargaining unit, but a workplace acquaintance of Ms. Tuck, who attended a farewell dinner for her after Ms. Tuck had left Toyota. Ms. Dornhoefer testified that at this dinner, Ms. Tuck confided to her that "her staff had signed their cards", that "I told them I can't protect you anymore" and that she "told them what union to choose", i.e. the CAW. She expressed her anger at Versa for transferring her from Toyota.

17. This application was filed on November 2, 1994. As indicated above, the application bore the old name of the CAW-Canada, although the new name had already been adopted. Employees signed membership evidence which also bore the old name, because new cards had not yet been printed. The Form A-4 submitted in support of the application pointed out the change in name; due to an error, the reference to the new name omitted the words "of Canada".

18. In argument, counsel for Versa submitted that the combination of Ms. Tuck's conduct and the irregularities in the forms filed by the union with this application should cause the Board to exercise its discretion under section 8 of the Act and order a representation vote. The employer

equates Ms. Tuck's conduct with the conduct of the applicant. The evidence, it is suggested, establishes that Ms. Tuck was acting on behalf of the union in these events. To the extent that she made threats to the job security of the employees, which led them to join the applicant, the applicant's membership support is under a cloud and should be confirmed through a representation vote.

19. The employer does not suggest that because of Ms. Tuck's involvement, section 13 applies to this organizing campaign. The employer very specifically denies that in any of her actions, Ms. Tuck was acting on behalf of the employer. The employer asserts that she was acting on behalf of the union throughout; the statements made by Ms. Tuck to Ms. Dornhoefer are an admission against interest as against the union.

20. Counsel for the employer urges the Board to draw adverse inferences from the fact that the union called no evidence. It is a reasonable inference from the evidence, it is suggested, that the union was complicit in Ms. Tuck's activities; it is incumbent on the union to rebut that. The fact that the union did not call as witnesses its inside organizer, its outside contact, or Ms. Tuck, should lead the Board to draw adverse inferences against the union. It is "symptomatic of the disregard shown by the union" of the Board and of the Board's processes.

21. The parties referred the Board to the following cases in their submissions: *Aurora Steel Service Limited*, [1986] OLRB Rep. March 301; *Masters Construction Ltd.*, [1988] OLRB Rep. Feb. 162; *Waldorf Astoria Hotel*, [1981] OLRB Rep. Sept. 1308; and *Dualex Enterprises Inc.*, a division of *Depco International Incorporated*, (Board File No. 2031-94-R) decision dated December 5, 1994 as yet unreported.

22. In *Davis Distributing Limited*, [1994] OLRB Rep. Sept. 1190, the Board discussed its approach to allegations of improper union conduct in the collection of membership evidence:

6. In deciding whether improper conduct by a union organizer casts doubt on the voluntariness of membership evidence, the Board is conscious of the heavy reliance that it places on membership evidence filed by a trade union in certification applications. In order to protect the integrity of a certification process which depends on such evidence, the Board takes care to ensure that where improper conduct is alleged, it is satisfied that it does not cast doubt on the reliability of that evidence: see, for example, *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444.

7. At the same time, the Board is also concerned that it not impose artificial standards of behaviour that are contrary to normal human interaction. The Board has stated that it does not act as a censor of the social pressures which are common to an organizing campaign on the part of those who either support or oppose the union. It would not be a surprise if some employees find the choice a difficult one, if some employees find it harder than others to resist peer pressure from one side or another, or if some employees make a decision which they later regret. It would not be a surprise to find that some statements made during an organizing drive turn out to be wrong, are rude or annoying, or cause distress. The Board assumes that the average employee engaged in a debate about the merits of unionization with other employees has a certain level of ability to make up his or her own mind and to act in accordance with his or her own volition.

8. In order to remain realistic about the social pressures that accompany an organizing drive, the Board has stated that it will treat as qualitatively different improper conduct on the part of union officials and improper conduct by a fellow employee. Further, the Board distinguishes between physical threats and threats to job security, and comments which do not contain those elements either directly or by implication: see *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 and *Dupont of Canada Ltd.*, [1961] OLRB Rep. Jan. 360. The Board has also distinguished between misrepresentations which are not fundamental in that they do not relate to the effect or purpose of the membership evidence, and those that do: see *Masters Construction Ltd.*, [1988] OLRB Rep. Feb. 162.

9. In this context, the Board ultimately looks to whether the conduct at issue would deter the reasonable employee, in other words, whether the reasonable employee faced with those circumstances would be able to make his or her own decision about union representation.

23. The employer in this case alleges that the applicant has collected its membership evidence through threats to employees' job security. If it were true that the union obtained its support through such threats, the voluntariness of its membership evidence would be in doubt. However, this case is quite different on its facts from those relied on by the employer. In *Aurora Steel Service*, the Board found that the collector of the membership evidence told certain employees that if they did not join the union, they could lose their jobs when the union came in. This was done in order to get the employees to sign union cards. In *Masters Construction Ltd.*, the union's organizers told one of the employees that if he did not join the union, he would be fired because his employer will only have employees affiliated with the union working for it. In *Waldorf Astoria Hotel*, the Board found that the union's organizer told employees that if they did not sign union cards, the organizer would be discharged first and the employees would probably be discharged next. The Board also found that the organizer misrepresented to certain employees that the manager supported the unionization of the employees. The combination of these statements led the Board to direct a representation vote.

24. In the case before us, there is no evidence that Ms. Tuck was involved in any way in the collection of the membership evidence submitted with this application. There is no evidence that she was acting on behalf of the union when she made comments to employees about the desirability of unionization. There is no doubt that Ms. Tuck's comments to employees were probably the catalyst that led them to seek unionization. However, there is nothing to suggest that she was doing anything but expressing her own views. The fact that some employees might have found her views persuasive and joined the applicant as a result does not mean that her actions should be taken to be those of the applicant.

25. Even if I were to accept as true that Ms. Tuck knew that the employees had signed membership cards in the applicant, and that she had given the name of the applicant to the employees, there is no evidence that she ever induced an employee to sign a membership card in the applicant on the basis of her statements. Indeed, apart from the conversation with Ms. Dornhoefer, there is absolutely no evidence that Ms. Tuck even knew that it was the CAW-Canada whom the employees contacted; this, despite detailed evidence from Ms. Vokes about their numerous conversations about the need for a union in the workplace.

26. Further, the Board's decisions relating to the use of threats to job security in the obtaining of membership evidence must be read in their context. There is a critical difference between a union organizer or supporter pointing out to employees the inherent vulnerability of their position at common law, without a collective agreement to "protect them", and statements made to the effect that employees who do not join the union, as distinct from those that join the union, might lose their jobs. The former kind of statement is simply not a threat in the sense of promising a *reprisal* if the listener does not comply. It is not a threat to suggest that without a collective agreement an employer is at liberty to change terms and conditions of employment. It may cause anxiety or consternation, but these are the sorts of matters that are commonly discussed during an organizing drive. Ms. Tuck's statements may have been more specific or emphatic in tone; however, they were clearly statements of her opinions, based on her own experience. They are not matters which are in her control to bring about, and they are not matters which employees would reasonably have seen as being in her control to bring about. Employees were free to form their own opinions about Ms. Tuck's statements; Ms. Vokes, for instance, did not take the statements at face value, and evidently felt Ms. Tuck was being premature in her predictions.

27. The cases where the Board has discounted membership evidence because of threats about job security have usually involved statements by a union organizer that employees who decide against joining the union may find their employment in jeopardy, because of this decision, and contrasted with employees who decide to join the union. In other words, the Board's concern is that a threat to job security not be used as a *reprisal* in order to induce employees to join a union. This is also why some of the Board's decisions distinguish between statements made during an organizing campaign by employees who are not in a position to effect the threatened reprisal, and those made by persons who have or are reasonably perceived to have the authority to bring about the consequences threatened: see, for example, *Covello Brothers Limited*, [1989] OLRB Rep. Feb. 119. *Waldorf Astoria Hotel* is arguably a case involving more general statements about the lack of job security without a union; however, the Board was clearly very concerned in that case about the impact on employees of the organizer's misrepresentation of management's support of the organizing drive. It is not evident that the Board would have directed a representation vote otherwise.

28. In the circumstances, I am not convinced that Ms. Tuck's encouragement of unionization amongst the employees, nor her strongly held and expressed views on the outlook for this workplace, cast doubt on the voluntariness of the membership evidence submitted. They are views which a reasonable employee could debate, challenge or accept. I do not find that they constitute intimidation or undue influence, even if made on behalf of the applicant, which they were not.

29. On the issue of "adverse inferences" raised by counsel for the employer, whether or not inferences can be drawn from the evidence is a matter of weighing the evidence and making findings of fact. Any party that decides not to call evidence runs the risk that in the absence of this evidence, inferences may be drawn from the opposing party's evidence which is contrary to its position. In this case, the employer urges me to draw the inference from all of the evidence that Ms. Tuck's activities were part of the union's organizing efforts. I have found that the evidence does not support this inference. The employer, however, also appeared to urge me to apply the notion of "adverse inference" more broadly, submitting that the union's failure to call evidence is indicative of a more general disregard of proper processes that the Board should take into account in determining whether a representation vote ought to be held. I reject this submission. As I have indicated, parties to a hearing make their own tactical decisions as to what evidence to call. It is a risk they take, and which they are entitled to take. There is nothing improper in making this sort of tactical decision. To the extent that there is a risk involved, the risk is related to the fact-finding process, and not to anything more general than that.

30. It was not argued that I should order a representation vote based on the errors in the A-4 form, the title in the application, or the name used in the membership applications, *apart* from the allegations regarding the conduct of Ms. Tuck. However, it was urged that these errors are compounded by the activities of Ms. Tuck in casting a cloud over this organizing campaign. There are certain aspects of the certification procedures on which the Board expects scrupulousness and great care on the part of a union. Clerical errors that do not lead to any prejudice, or give rise to material misunderstandings, however, do not in themselves undermine the merits of an application. Further, although the membership evidence was collected under the old name at a time after the CAW-Canada adopted its new name, there is no suggestion that any employee was misled by this.

31. For these reasons, the Board finds that there is no reason to hold a representation vote. On the basis of all the evidence before me, I am satisfied that more than fifty-five percent of the employees in the bargaining unit at the time of this application had applied to become members of the applicant on or before that date.

32. The Board finds that the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) is a trade union within the meaning of section 1(1) of the Act.

33. Having regard to the agreement of the parties, the Board finds that:

all employees of Versa Foods Services, a Division of Versa Services Ltd. engaged in its cafeteria operation at Toyota Manufacturing Company in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of November 2, 1994,

constitute a unit of employees of the responding party appropriate for collective bargaining.

34. A certificate will issue to the applicant, in its new name: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada). The title of proceedings is amended accordingly.

2573-94-U William J. Viveen, Applicant v. United Steelworkers of America Local 7135, Responding Party v. National Steel Car Limited, Intervenor

Discharge - Duty of Fair Representation - Health and Safety - Practice and Procedure - Unfair Labour Practice - Probationary employee's earlier health and safety discharge complaint dismissed by Board - Employee now seeking reinstatement in new application by shifting focus to trade union and alleging breaches of *Labour Relations Act* - Board unable to discern any labour relations purpose for inquiring into complaint - Complaint dismissed

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Rundle and J. Redshaw.

DECISION OF THE BOARD; January 26, 1995

I

1. This is a complaint under section 91 of the *Labour Relations Act* that was received by the Board on October 18, 1994.

2. The complainant, William Viveen, contends that United Steelworkers of America Local Union 7135 ("the union") has contravened various sections of the *Labour Relations Act*. National Steel Car Limited ("the employer") has intervened in this proceeding.

3. Before turning to our disposition of this complaint, it may be useful to review some of the background to the case and say something about the legal framework within which the parties' rights must be determined.

4. The Ontario *Labour Relations Act* and the *Occupational Health and Safety Act* contain the following provisions:

Labour Relations Act

91.-(1) *The Board may authorize* a labour relations officer to inquire into any complaint alleging a contravention of this Act.

• • •

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, *the Board may inquire* into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Rules

12. Any application filed with the Board must include the following details:

• • •

- (d) a detailed statement of all the material facts on which the applicant relies, including the circumstances, what happened, when and where it happened, and the names of any persons said to have acted improperly.

16. Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its

reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.

Occupational Health and Safety Act

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) *The Ontario Labour Relations Board may inquire* into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the *Police Services Act* shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

5. We might note, parenthetically, that the Board's role in "enforcing" the *Occupational Health and Safety Act* is a very limited one. The Board does not have the general authority to receive complaints of a violation of the Act nor to direct compliance with the Act or Regulations. That is the responsibility of the Ministry of Labour and its inspectors. The Board's role is restricted to adjudicating complaints of employer reprisals under section 50 of the Act. In *Pamela Green v. General Motors of Canada Limited* (Board File No. 0603-93-OH) the Board put it this way:

4. The *Occupational Health and Safety Act* creates a series of reciprocal rights and obligations for employers, employees and others. The objective is to promote a safe work environment; and, to that end, there is a web of regulations, restrictions, and reporting requirements.

5. However, the enforcement of the *Occupational Health and Safety Act* is not the primary responsibility of the Ontario Labour Relations Board (see generally Part VIII of the Act concerning "ENFORCEMENT"), nor does the Board have the panoply of powers to make the remedial directions that an Inspector can make (see section 54 and following).

6. The Board's role under the *Occupational Health and Safety Act* is a very limited one. The Board is not concerned with the enforcement of the Act, as such, but rather with situations where an employee claims that s/he has been penalized because s/he has sought enforcement of the Act. The focus of section 50 is the employment consequences of pursuing rights rather than the underlying situation in the workplace which the employee claims is hazardous. For example, if an employee is discharged for calling a Health and Safety Inspector, s/he may be reinstated as a result of a complaint to the Board. But the focus is the adverse employment consequence rather than the safety problem which prompted him/her to call the Inspector.

6. Section 91(4) of the *Labour Relations Act* and section 50(3) of the *Occupational Health and Safety Act* give the Board a discretion whether or not to inquire into a complaint of a violation of the *Labour Relations Act* or the *Occupational Health and Safety Act*. The Board is not obliged to undertake such enquiry (see the decision of the Divisional Court in *Sheller Globe* 83 CLLC ¶14,052). However, if the Board does undertake such inquiry, section 108(1) makes its decision final and binding.

7. As we have already mentioned, section 50 of the *Occupational Health and Safety Act* protects an employee from employer reprisals if that employee was seeking to exercise rights under the OHSA. If an employee believes that he has been the subject of such reprisal, he has two choices: he may *either* try to pursue the matter under any collective agreement that may be applicable, *or* he may make a complaint to the Labour Relations Board. The arbitration option depends upon union co-operation and the existence of a collective agreement permitting the challenge. An employee can come to the Ontario Labour Relations Board on his own.

8. If the employee opts to come to the Board under section 50 of the OHSA, the Board will decide whether or not to enquire into the complaint. If the Board does entertain the complaint, it will typically hold a hearing, and will decide:

- (a) whether the employee has indeed been discharged, disciplined or otherwise penalized *because* he was exercising rights under the OHSA; and
- (b) whether, *in any event*, the employer's behaviour was just and equitable in all the circumstances.

The hearing is conducted much like a case in civil court. The parties present or defend their own positions, and put before the Board whatever evidence or argument they think is appropriate.

9. It is important to emphasize that after a hearing under section 50 the Board's task is two-fold:

- (1) it must first decide whether the employer's conduct (a discharge for example) was improperly motivated and thus a breach of the OHSA; and
- (2) then *even if the employer decision was not improperly motivated* and

thus was not a breach of the OHSA, the Board may still decide, whether, in all the circumstances, the employer's response was reasonable.

In other words, even if the employer has not breached section 50(1) of the Act (i.e. has not acted "illegally") the Board may still decide that the employer response was an over reaction or was otherwise unfair. (See generally the decisions of the Board in: *Commonwealth Construction Company*, [1987] OLRB Rep. July 961; *Everette Chapelle*, [1990] OLRB Rep. Dec. 1238 and *H. H. Robertson Inc.*, [1991] OLRB Rep. April 492). Conversely, the Board may decide that the employer's actions were "just and reasonable" in all the circumstances.

10. With this overview, then, we return to the instant case.

II

11. Mr. Viveen was hired by National Steel Car in early April 1994. His employment was terminated about six weeks later on May 13, 1994.

12. At the time of Mr. Viveen's termination he was still a probationary employee as defined in Article 7.02(a) of the collective agreement. That article reads as follows:

An employee having less than three (3) months of service shall be considered a probationary employee and will have no seniority rights ... if a probationary employee's service is terminated for reasons other than lack of work the company will so inform the employee at the time of termination. *The union will not question the lay-off or dismissal of any probationary employees nor shall such lay-off or dismissal be the subject of a grievance*".

[emphasis added]

As will be seen, the collective agreement says that the dismissal of a probationary employee cannot be questioned by the union or made the subject of a grievance.

13. The company took the position that Mr. Viveen had been terminated because of unauthorized absenteeism and related problems. Mr. Viveen contended that he was fired because he had acted in compliance with the *Occupational Health and Safety Act* or was seeking the enforcement of that Act. Accordingly, Mr. Viveen exercised the *option* mentioned above to complain to the Board under section 50 of the *Occupational Health and Safety Act*. The section 50 complaint (Board File No. 0764-94-OH) was filed on June 2, 1994.

14. Mr. Viveen's complaint came on for hearing before a panel of the Board in July 1994. The hearing consumed approximately two days, during which the Board heard the evidence of a number of witnesses, including Mr. Viveen himself.

15. In a decision dated August 2, 1994 the Board reviewed the evidence that had been put before it and made various factual findings. Those findings need not be repeated here. It suffices to say that, when weighing the credibility of the various witnesses, the Board preferred the evidence of the employer's witnesses over that of Mr. Viveen. The Board did not accept Mr. Viveen's version of events. The Board found that evidence of other witnesses was more credible.

16. The Board noted that under section 50(1) of the OHSA, the onus is on the employer to establish that "anti-health and safety motivation" played *no role whatsoever* in its decision to terminate Mr. Viveen's employment. That is the first issue which the Board has to consider under section 50. As the Board put it:

"The issue under subsection 50(1) is not whether there was just cause for the termination, but whether in terminating the applicant's employment, the responding party had in mind any reason relating to the complainant's acting in compliance with, or his seeking enforcement of the *Occupational Health and Safety Act* or its Regulations ..."

However, the Board also went on to say:

26. Whether or not the Board finds a violation of subsection 50(1), the Board still has the discretion under subsection 50(7) to substitute such other remedy as appears just and reasonable in all the circumstances. Subsection 50(7) has been interpreted so as not to discourage the raising of health and safety concerns. The Board has exercised its discretion to substitute a lesser penalty when the employee is acting out of a bona fide health and safety concern, and there is a connection between that concern and the actions of the employer, although the connection is not sufficient to constitute a violation of subsection 50(1). Conversely, the Board has declined to exercise its discretion under subsection 50(7) where there is no connection whatsoever between the health and safety concern expressed by the employee and the discipline imposed by the employer. (*National Plastic Profiles Inc.*, supra, at para 46; see also *Bilt-Rite Upholstering Co. Ltd.* [1990] OLRB Rep July 755 at paragraph 47.)

This is the two-fold task that we have referred to above: is the employer's conduct a breach of section 50(1); and, even if the employer has not acted illegally, were its actions "reasonable" in the circumstances.

17. On the question of whether there had been a breach of the OHSA the Board reviewed the evidence and concluded:

The Board finds that Mr. Viveen was terminated because he was absent without just cause on five occasions during his first six weeks of employment, and not because he was acting in compliance with or sought the enforcement of the *Occupational Health and Safety Act*. Therefore, there is no violation of subsection 50(1) of the *Occupational Health and Safety Act*.

18. The Board was satisfied that Mr. Viveen had not been fired because he was exercising rights under or seeking to enforce the OHSA. The company had not acted unlawfully.

19. The Board then went on to consider whether it should interfere with the discharge - not because it was a breach of the OHSA, but rather because under section 50(7) the Board could review the situation and decide whether the termination of Mr. Viveen's employment was "unjust" or "unreasonable" in the circumstances. This is what the Board said:

30. Although the Board still has the discretion under subsection 50(7) to substitute the penalty imposed by the employer, we decline to do so. Although Mr. Viveen might reasonably have perceived a connection between his dismissal and his complaints about his safety equipment, we find on the evidence there was no connection between the two. In such circumstances, we would be reluctant to interfere with the employer's exercise of discretion in choosing the appropriate disciplinary measure. Further, *the employer's disciplinary response to a probationary employee who has been absent without just cause five days in the first six weeks of employment, was not unreasonable.*

[emphasis added]

20. In summary, then, the Board concluded:

- (1) there was nothing illegal about Mr. Viveen's discharge; and
- (2) there was nothing unreasonable or unfair about it either.

21. An application for reconsideration of the Board's decision was dismissed, with reasons, on September 8, 1994.

III

22. The present complaint was filed on October 18, 1994, names the trade union as a responding party, and mentions a number of provisions of the *Labour Relations Act* (sections 13, 67, 69, 70, 71, 72, 81.2, 82(1), 129 and 134). The material accompanying the complaint focuses once again upon Mr. Viveen's alleged safety concerns, the conversations with various union or employer officials during the six weeks that he was employed by the company, and his discharge on May 13, 1994.

23. Many of the statutory provisions referred to in the new complaint have no application to, or cannot be contravened by, a trade union. Others have no possible application to the events described by Mr. Viveen. In this regard, the allegations cannot make out an arguable case for a contravention of the Act, even if the assertions made in the complaint are true.

24. However, there is a more fundamental problem with Mr. Viveen's October complaint: when one considers the remedies requested, it is apparent that the new complaint is an effort to re-litigate the propriety of a discharge which has already been found by the Board to be both "lawful" and "reasonable". Having lost his case against the employer, Mr. Viveen now seeks the same remedy (reinstatement, compensation etc.) by shifting the focus to the trade union and alleged breaches of the *Labour Relations Act*.

25. Insofar as the employer is concerned, it is no longer open to Mr. Viveen to challenge the propriety of his discharge. If there were arguments, legislative provisions, witnesses or evidence relevant to that matter it was incumbent upon Mr. Viveen to raise them in conjunction with the first complaint. To put the matter in layman's terms: a complainant cannot litigate his case piece meal.

26. In the course of the first complaint, it was open to Mr. Viveen to argue these matters either as part of his challenge to his termination, or in conjunction with the very general remedial discretion that the Board has under section 50(7) of the Act. However, he did not do that, and in our view, he cannot do so now. In our view, the employer should not be required to defend itself again. As regards the employer, the circumstances of Mr. Viveen's discharge have been fully and finally adjudicated and found to be reasonable. To put the matter another way: the employer's decision to terminate Mr. Viveen's employment was not illegal and was not unreasonable in the circumstances.

27. Given that finding is there any aspect of the new complaint which would now warrant further inquiry or justify a further hearing into the circumstances preceding or leading to Mr. Viveen's termination? In our view the answer is no.

28. When Mr. Viveen's latest allegations are reviewed as a whole, it is evident that most of them involve his continuing contention that health and safety issues were the primary focus of his concerns on the job and the primary reason for his discharge. But these matters have already been fully litigated, and should not be reviewed again. Nor is it this Board's role to interpret and enforce the *Occupational Health and Safety Act* except to the limited degree necessary under section 50 - a task which it has already addressed. For as we have already noted, the Board has no general jurisdiction to enforce the provisions or regulations of the *Occupational Health and Safety Act*. Its role is confined to adjudicating reprisal complaints under section 50 - as it has already done in this case.

29. *Labour Relations Act* sections 67, 70, 81.2, 82(1), 13, 71, 72, 134, and 129 mentioned by Mr. Viveen in his complaint have no application to any of the facts asserted and provide no arguable foundation for the complaint. Section 69 *might conceivably* apply to a trade union in appropri-

ate circumstances, however, the circumstances reviewed by Mr. Viveen (read together with the facts found by the Board in the earlier case) do not make out an arguable case that the union has acted in a manner that is "arbitrary", "discriminatory" or "in bad faith".

30. However, even if there might be some arguable case with respect to section 69, we can discern no labour relations purpose for any inquiry at this stage.

31. It is extremely doubtful whether Mr. Viveen ever had any rights under the collective agreement which the union might have pursued, because the rights of probationary employees are extremely limited. However, Mr. Viveen did not pursue that option, and insofar as rights under the OHSA are concerned, Mr. Viveen has already taken that matter to the Board on his own, as he was entitled to do. But his complaint was rejected. Any rights to employment or continuing employment or compensation for loss of employment have been fully and finally determined when the Board concluded that his discharge was both "legal" and "not unreasonable". The Board found that he was not entitled to reinstatement or compensation from the employer, and the union was clearly not the cause of his discharge. And that being so, it is difficult to see what other remedy might be available from the union or would warrant relitigation of those events, even if the Board were disposed to entertain such application.

32. In our view, no useful purpose would be served by any further inquiry into this complaint.

33. Accordingly, pursuant to Rule 24 and the Board's discretion under section 91(4) of the Act, this complaint is dismissed.

COURT PROCEEDINGS

2526-89-G (Court File No. 24243) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractor Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal - Supreme Court of Canada dismissing application for leave to appeal

Board decision reported at [1992] OLRB Rep. Feb. 147. Motions court decision reported at [1992] OLRB Rep. July 885. Divisional Court decision reported at [1994] OLRB Rep. Jan. 113. Court of Appeal decision reported at [1994] OLRB Rep. June 801.

Supreme Court of Canada, La Forest, Sopinka and Major JJ., January 12, 1995.

The Court: The application for leave to appeal is dismissed with costs.

4171-93-R (Court File No. 687/94) Reynolds-Lemmerz Industries, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), The Ontario Labour Relations Board, and The Attorney General of Ontario, Respondents

Bargaining Unit - Certification - Employee - Judicial Review - Practice and Procedure - Representation Vote - Parties disputing status of certain individuals - Board rejecting union's submission that doctrines of *res judicata* or issue estoppel applying to prevent employer from taking position different from position taken in union's earlier certification application - Board rejecting employer's submission that in circumstances of the case, including its assertion that union's support barely over 55%, representation vote should be ordered - Board revoking appointment of Labour Relations Officer and directing hearing before panel of Board in order to expedite resolution of bargaining unit configuration issues - Employer's application for judicial review dismissed

Board decision reported at [1994] OLRB Rep. Sept. 1242.

Ontario Court of Justice, Divisional Court, O'Brien, O'Driscoll and Steele JJ., January 6, 1995.

O'Brien J. (endorsement): This matter proceeded before us on an innocently incomplete record, but the argument was on an issue which was not raised in the factum.

The application arises from a long, bitterly contested, certification application. Statements of the Board, contained in paragraph 22 of its decision of September 1, 1994, create some confusion. However, when read in the context of the entire certification process and of the hearings and proceedings before the Ontario Labour Relations Board, we are satisfied that the application to the Board was one which was, and could only have been made, under s.8(3) of the Labour Relations Act, R.S.O. 1990, c.L.2, requesting an expressionary vote be taken. On that basis, the Board's decision and the exercise of its discretion is not patently unreasonable.

The application is therefore dismissed.

CASE LISTINGS DECEMBER 1994

	PAGE
1. Applications for Certification	1
2. Applications for Combination of Bargaining Units	11
3. Applications for First Contract Arbitration	11
4. Applications for Declaration of Related Employer	11
5. Sale of a Business	12
6. Union Successor Rights	14
7. Section 64.2 - Successor Rights/Contract Services	14
8. Applications for Declaration Terminating Bargaining Rights	14
9. Applications for Declaration of Unlawful Strike	15
10. Applications for Direction Respecting Unlawful Lockout	15
11. Applications Concerning Replacement Workers	16
12. Complaints of Unfair Labour Practice	16
13. Applications for Interim Order	19
14. Applications for Religious Exemption	20
15. Jurisdictional Disputes	20
16. Applications for Determination of Employee Status	20
17. Complaints under the Occupational Health and Safety Act	20
18. Construction Industry Grievances	20
19. Referral from Minister (Sec. 3(2)) HLDAA	24
20. Applications for Reconsideration of Board's Decision	24

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1988-94-R: Hospitality & Service Trades Union Local 261 (Applicant) v. FJS Holdings (c.o.b. as My Cousin's Restaurant) (Respondent)

Unit: "all employees of FJS Holdings Ltd. (c.o.b. as My Cousin's Restaurant) in the City of Ottawa, save and except managers, persons above the rank of manager and payroll clerk" (38 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2031-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dualux Enterprises Inc., a division of Depco International Incorporated (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Dualux Enterprises Inc., a division of Depco International Incorporated, at 340 Rexdale Blvd., Rexdale, save and except supervisors, persons above the rank of supervisor, technical employees, office and clerical staff" (111 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2148-94-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meadowcroft Holdings Inc. carrying on business as Execu-Care Nursing Services, Kitchener Meadowcroft Limited Partnership, 5M Management Services Limited (Respondents)

Unit #1: "all employees of Meadowcroft Holdings Inc. carrying on business as Execu-Care Nursing Services, Kitchener Meadowcroft Limited Partnership, 5M Management Services Limited at 20 Fieldgate Street, Kitchener, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period" (19 employees in unit) (*Clarity Note*)

Unit #2: (see Applications for Certification Dismissed subsequent to a Post-Hearing vote)

2318-94-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Norfolk Board of Education (Respondent)

Unit: "all office and clerical employees employed by The Norfolk Board of Education, save and except Administrative Assistant, Purchasing Officer, Secretary to the Director of Education, Office Manager and Secretary to the Superintendent of Business Affairs, Personnel Officer, Confidential Secretary and persons in any bargaining unit for which any trade union held bargaining rights as of October 3, 1994" (61 employees in unit) (*Having regard to the agreement of the parties*)

2417-94-R: United Steelworkers of America (Applicant) v. Bruin Engineered Parts Inc. (Respondent)

Unit: "all employees of Bruin Engineered Parts Inc. in the Town of Midland, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (63 employees in unit) (*Having regard to the agreement of the parties*)

2431-94-R: Canadian Union of Public Employees (Applicant) v. Central & Northern Etobicoke Home Support Services (Respondent)

Unit: "all employees of Central & Northern Etobicoke Home Support Services in the Municipality of Metropolitan Toronto, save and except Financial Manager, Supervisor of Home Support, persons above the rank of

Supervisor of Home Support, and Secretary to the Executive Director" (28 employees in unit) (*Having regard to the agreement of the parties*)

2562-94-R: United Steelworkers of America (Applicant) v. Samuel Manu-Tech Inc. (Respondent) v. Gino Tittarelli, Terry Crossgrove, Bill Doxtator, Jack Kearse and Tom Wilder on behalf of one hundred and fifteen (115) employees employed at the Responding Party's Stoney Creek plant (Intervener)

Unit: "all employees of Samuel Manu-Tech Inc. in the City of Nanticoke save and except forepersons, persons above the rank of foreperson and administrative assistant." (41 employees in unit) (*Clarity Note*)

2657-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1006571 Ontario Ltd. (Respondent)

Unit: "all construction labourers in the employ of 1006571 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 1006571 Ontario Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2680-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Armabec (1990) Inc. (Respondent)

Unit: "all rodmen in the employ of Armabec (1990) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all rodmen in the employ of Armabec (1990) Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2859-94-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Emonts Masonry Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Emonts Masonry Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Emonts Masonry Construction Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin and the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2884-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: "all employees of Zellers Inc., employed at its store at 1571 Sandhurst Circle in the City of Scarborough, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, personnel clerks and students employed in a co-operative work program" (108 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2890-94-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC. (Applicant) v. Goodyear Canada Inc. (Respondent)

Unit: "all employees of Goodyear Canada Inc. in the Town of Oakville, save and except Service Manager, persons above the rank of Service Manager, office and sales staff and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

2905-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Famz Food Limited c.o.b. as Swiss Chalet Restaurant #196 (Respondent)

Unit: “all persons employed as waitress/servers/waiters, buspersons, kitchen staff, cashiers, bartenders and students, at Swiss Chalet Take Out and Restaurant at 160 Keil Drive South, Chatham, save and except Assistant Dining Room Manager and employees above the rank of Assistant Dining Room Manager” (36 employees in unit) (*Having regard to the agreement of the parties*)

2922-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Cashway Building Centres Inc. (Respondent)

Unit: “all employees of Cashway Building Centres Inc. in the City of Brantford, save and except Store Manager, Assistant Store Manager, Yard Foreman and Head Cashier” (39 employees in unit) (*Having regard to the agreement of the parties*)

2923-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., O.F. of L., C.I.O. and C.L.C. (Applicant) v. Victorian Order of Nurses, Thunder Bay and District Branch (Respondent)

Unit: “all employees of The Victorian Order of Nurses, Thunder Bay and District, employed as Registered or Graduate Practical Nurses in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of the date of application (November 10, 1994)” (21 employees in unit) (*Having regard to the agreement of the parties*)

2924-94-R: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Mr. Plaster (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Mr. Plaster in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Mr. Plaster in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit) (*Clarity Note*)

2958-94-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 45 and 65 Southport Avenue and at 130 Bloor Street West in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisors” (3 employees in unit) (*Having regard to the agreement of the parties*)

2961-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Perth-Huron Branch (Respondent)

Unit: “all Registered and Graduate Practical Nurses employed in a nursing capacity by the Victorian Order of Nurses Perth-Huron Branch, in the Counties of Perth and Huron, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

2965-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Manvers (Respondent)

Unit: “all employees of The Corporation of the Township of Manvers in the Township of Manvers, save and except Deputy-Clerk Treasurer, Roads Superintendent and Area and Community Centre Manager and persons above such ranks” (11 employees in unit) (*Having regard to the agreement of the parties*)

2967-94-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Hamilton-Wentworth (Respondent)

Unit: “all employees of The Regional Municipality of Hamilton-Wentworth in its Public Health Unit, Child &

Adolescent Services Division in The Regional Municipality of Hamilton-Wentworth, save and except Department Head, persons above the rank of Department Head, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (10 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2979-94-R: Communications, Energy & Paperworkers Union (Applicant) v. Polysar Rubber Corporation (Respondent)

Unit: "all employees of Polysar Rubber Corporation employed as Plant Protection Officers at its Sarnia, Ontario site in the City of Sarnia, save and except Supervisors and persons above the rank of Supervisor" (20 employees in unit) (*Having regard to the agreement of the parties*)

2991-94-R: IWA-Canada (Applicant) v. Earnway Industries (Canada) Ltd. (Respondent)

Unit: "all employees of Earnway Industries (Canada) Ltd. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, sales staff and office staff" (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2992-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Peel Finishing Ltd. (Respondent)

Unit: "all employees of Peel Finishing Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and sales staff" (242 employees in unit) (*Having regard to the agreement of the parties*)

2993-94-R: United Steelworkers of America (Applicant) v. Lacey's Taxi, Ltd. (Respondent)

Unit: "all employees of Lacey's Taxi, Ltd. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, clerical staff, garage staff and dispatchers" (67 employees in unit) (*Having regard to the agreement of the parties*)

2994-94-R: United Steelworkers of America (Applicant) v. The Brick Warehouse Corporation (Respondent)

Unit: "all employees of The Brick Warehouse Corporation in the City of St. Catharines regularly employed for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor" (23 employees in unit) (*Having regard to the agreement of the parties*)

2995-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Evergreen Returnable Co. Inc. (Respondent)

Unit: "all employees of Evergreen Returnable Co. Inc. in the Municipality of Eganville, save and except Plant Manager, persons above the rank of Plant Manager and Office Manager" (16 employees in unit) (*Having regard to the agreement of the parties*)

3003-94-R: Canadian Union of Postal Workers (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at the Kitchener Mail Processing Plant, 70 Trillium Drive, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, and office staff and clerical staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

3011-94-R: Ontario Public Service Employees Union (Applicant) v. St. Thomas/Elgin Unemployed Help Centre (Respondent)

Unit: "all employees of St. Thomas/Elgin Unemployed Help Centre in the County of Elgin, save and except supervisors and persons above the rank of supervisor" (14 employees in unit) (*Having regard to the agreement of the parties*)

3013-94-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Sutherland-Schultz Inc. (Respondent)

Unit: “all journeymen and apprentice boilermakers in the employ of Sutherland-Schultz Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice boilermakers in the employ of Sutherland-Schultz Inc. in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (19 employees in unit)

3018-94-R: Ontario Secondary School Teachers’ Federation (Applicant) v. The Simcoe County Roman Catholic Separate School Board (Respondent)

Unit: “all office and clerical employees of The Simcoe County Roman Catholic Separate School Board in the elementary and secondary schools, and the adult education centres, save and except Principals or his/her designates, persons above the rank of Principal or his/her designate, and employees in any bargaining units for whom any trade union held bargaining rights as of November 23, 1994” (74 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3031-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Vytec Corporation (Respondent)

Unit: “all Tool Room employees of Vytec Corporation working in the City of London, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

3048-94-R: Association of Professional Student Services Personnel (Applicant) v. Bruce-Grey County Roman Catholic Separate School Board (Respondent)

Unit: “all employees of the Bruce-Grey Roman Catholic Separate School Board in the Counties of Bruce and Grey employed as speech and language pathologists, psychometrists, social workers/attendance counsellors, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

3061-94-R: Canadian Hotel and Service Workers Union (Applicant) v. Snap Printing (Respondent)

Unit: “all employees of Snap Printing in the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

3109-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Browning Ferris Industries Ltd. (Respondent)

Unit: “all employees of Browning Ferris Industries Ltd. in the City of Kitchener, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff” (36 employees in unit) (*Having regard to the agreement of the parties*)

3136-94-R: International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Unistrut Canada Limited (Respondent)

Unit: “all journeymen glaziers, apprentice glaziers and metal mechanics in the employ of Unistrut Canada Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen glaziers, apprentice glaziers and metal mechanics in the employ of Unistrut Canada Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

3144-94-R: Power Workers’ Union, CUPE Local 1000 (Applicant) v. The Town of Markham Hydro Electric Commission (Respondent)

Unit: "all inside employees of The Town of Markham Hydro Electric Commission in the Town of Markham, save and except Supervisors, persons above the rank of Supervisor, students employed during the school vacation period, co-operative students employed during their work term, persons regularly employed for not more than 24 hours per week and temporary employees and the Payroll Administrator" (38 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3155-94-R: National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 596330 Ontario Ltd. o/a Southwest Warehousing (Respondent)

Unit: "all employees of 596330 Ontario Ltd. o/a Southwest Warehousing in the City of Chatham, save and except supervisors, persons above the rank of supervisor, office and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

3161-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Crystal Maintenance Contractors Limited (Respondent)

Unit: "all employees of Crystal Maintenance Contractors Limited engaged in cleaning and maintenance at 225 Jarvis Street in the Municipality of Metropolitan Toronto, save and except non-working supervisory personnel, persons above the rank of non-working supervisory personnel, office and clerical staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

3168-94-R: Canadian Union of Public Employees (Applicant) v. C.A.W. Community Child Care & Developmental Services Inc. (Respondent)

Unit: "all employees of C.A.W. Community Child Care & Developmental Services Inc. in the City of Windsor, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of December 2, 1994" (13 employees in unit) (*Having regard to the agreement of the parties*)

3172-94-R: Ontario Public Service Employees Union (Applicant) v. Versa Services Ltd. (Respondent) v. Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees Local Union No. 647 (Intervener)

Unit: "all employees of Versa Services Ltd. engaged in cafeteria food service at Niagara College, Welland Campus, in the Regional Municipality of Niagara, save and except supervisors, persons above the rank of supervisor, office staff, clerical staff, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of December 2, 1994" (21 employees in unit) (*Having regard to the agreement of the parties*)

3173-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Guelph-Wellington-Dufferin Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Guelph-Wellington-Dufferin Branch, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (39 employees in unit) (*Having regard to the agreement of the parties*)

3213-94-R: United Steelworkers of America (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. engaged in its cafeteria food service at Lear Seating, 2001 Forbes Street, in the Town of Whitby, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

3221-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sara Vista Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Sara Vista Nursing Home in the Village of Elmvale, save and except the Director of Nursing, persons above the rank of Director of Nursing, and persons for whom any trade union held bargaining rights as of December 6, 1994" (7 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

3812-93-R: United Steelworkers of America (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: "all employees of Burns International Security Services Limited in the City of Cornwall, save and except Field Supervisors and persons above the rank of Field Supervisor" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	3

2767-94-R: Power Workers' Union Canadian Union of Public Employees Local 1000, C.L.C. (Applicant) v. The Hydro Electric Commission of the Township of Brantford (Respondent) v. International Brotherhood of Electrical Workers Local 636 (Intervener)

Unit: "all employees of the Hydro Electric Commission of the Township of Brantford, save and except foremen, persons above the rank of foremen, office clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1097-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Maidstone Manufacturing Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Maidstone Manufacturing Inc. in the Township of Maidstone, save and except General Foreman, persons above the rank of General Foreman, office and sales staff" (332 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	297
Number of persons who cast ballots	285
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	285
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	142
Number of ballots marked against applicant	141

1618-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Superior Laminated Products Co. Limited (Respondent)

Unit: "all employees of Superior Laminated Products Co. Limited in the Municipality of Scarborough, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	66
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	5

2236-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. at the Uptown Theatre in the Municipality of Metropolitan Toronto, save and except Floor Supervisors, persons above the rank of Floor Supervisor and persons in bargaining units for which any trade union held bargaining rights as of September 26, 1994" (51 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

2287-94-R: United Steelworkers of America (Applicant) v. Seeburn Division of Ventra Group Inc. (Respondent)

Unit: "all employees of Ventra Group Inc. in its Seeburn Division in the Town of New Tecumseth, save and except supervisors, persons above the rank of supervisor, and engineering, office, clerical, sales, security staff and students employed on a co-op work/study program" (185 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	204
Number of persons who cast ballots	198
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	99
Number of ballots marked against applicant	93
Number of ballots segregated and not counted	3

Applications for Certification Dismissed Without Vote

1588-92-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canadian Linen Supply Company Limited (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

4141-93-R: Euclid-Hitachi Employees Association (Applicant) v. Euclid-Hitachi Heavy Equipment Ltd. (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1917 (Intervener)

Unit #1: "all employees of VME Equipment of Canada Ltd. in the City of Guelph, save and except supervisors, persons above the rank of supervisor, office staff and sales staff." (163 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	174
Number of persons who cast ballots	167
Number of ballots marked in favour of applicant	78
Number of ballots marked in favour of intervener	89

2694-94-R: Office and Professional Employees International Union (Applicant) v. University Hospital (Respondent)

Unit #1: "all employees at University Hospital in the City of London, save and except Supervisors, persons above the rank of Supervisors, Secretaries to the President and Vice-Presidents, persons employed in Human Resources Services, Graduate and Registered Nurses, students employed during the school vacation period, employees for whom any other trade unions had bargaining rights as of October 27, 1994, persons employed in a specialist position, persons employed in a technical position, and professional medical staff" (449 employees in unit)

Number of names of persons on revised voters' list	451
Number of persons who cast ballots	359
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	358
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	124
Number of ballots marked against applicant	232
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1535-92-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Price Club St. Laurent Inc. c.o.b. as Price Club Westminster (Respondent) v. Group of Objecting Employees (Objectors)

Unit: "all employees of Price Club St. Laurent Inc. c.o.b. as Price Club Westminster in the Township of Westminster, save and except supervisors, persons above the rank of supervisor, security guards, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period" (95 employees in unit)

Number of names of persons on revised voters' list	105
Number of persons who cast ballots	101
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	79
Number of ballots segregated and not counted	9

0312-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 855569 Ontario Limited c.o.b. Bearance's I.G.A. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of 855569 Ontario Limited c.o.b. Bearance's I.G.A., save and except Department Managers, persons above the rank of Department Manager, Head Cashier, File Maintenance Clerk and full-time Meat Department employees" (49 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	47
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	31

0350-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the Corporation of the Town of Fort Frances (Respondent) v. Local Union 1744, International Brotherhood of Electrical Workers (Intervener)

Unit: "Journeyman Lineman Lead Hand, Journeyman Lineman/Meterman, Journeyman Lineman/Substation Maintainer, Journeyman Lineman, Lineman Trainee, Groundman, Casual Labour" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	4
Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	5

2148-94-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meadowcroft Holdings Inc. carrying on business as Execu-Care Nursing Services, Kitchener Meadowcroft Limited Partnership, 5M Management Services Limited (Respondents)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all employees of Meadowcroft Holdings Inc. carrying on business as Execu-Care Nursing Services, Kitchener Meadowcroft Limited Partnership, 5M Management Services Limited regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at 20 Fieldgate Street, Kitchener, save and except supervisors and persons above the rank of supervisor" (49 employees in unit)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	22

Applications for Certification Withdrawn

0991-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Royal Pine Homes Ltd. (Respondent)

0400-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Nor Eng Construction & Engineering Inc. (Respondent)

2485-94-R: United Steelworkers of America (Applicant) v. Oryx Fixtures Inc. (Respondent)

2703-94-R: Sheet Metal Workers International Association Local Union 285 (Applicant) v. Zentil Plumbing & Heating Contracting Ltd., Zentil Plumbing & Heating Contracting Inc., Zentil Plumbing & Heating Limited (1035354 Ont. Ltd.), Zentil Plumbing & Heating Service Dept. Ltd. (Respondents)

2883-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Ventratech Limited (Respondent)

2904-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Scott's Food Services Inc. (Respondent)

3094-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Electro Arts Ltd. (Respondent)

3291-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Modern Building Cleaning Services (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0019-93-R: George Jeffrey Children's Treatment Centre (Applicant) v. Service Employees Union Local 268 (Respondent) (*Granted*)

1835-94-R: United Food and Commercial Workers International Union (Applicant) v. Coca-Cola Bottling Ltd. (formerly T.C.C. Bottling Ltd.) (Respondent) (*Granted*)

2237-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent) (*Granted*)

2274-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Quebecor Printing PE & E (Respondent) (*Granted*)

2913-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Proving Graphics Limited (Respondent) (*Granted*)

FIRST AGREEMENT - DIRECTION

3270-94-FC: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Hamilton Baking Company (1988) Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3169-92-R; 3685-92-R; 3815-92-R; 0943-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction (1983) Limited and 352021 Ontario Limited (Respondents); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (*Denied*)

1407-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Royalpine Homes Limited, Blenheim Developments Inc., Elderhills Developments Inc., Bridle Village Developments Inc. (Respondents) (*Granted*)

2815-93-R; 3408-93-R: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Berkley Contracting Limited and T. Eaton Company Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Locals 494 & 18 (Applicant) v. T. Eaton Company Limited and Eatons Contract Sales (Respondents) (*Withdrawn*)

0300-94-R: IWA Canada Local 1-2995 (Applicant) v. Hearst Forest Management Inc., Lecours Lumber Co. Limited, Malette Inc., Levesque Plywood Limited (Respondents) (*Withdrawn*)

0441-94-R; 1028-94-R: Ontario Public Service Employees Union (Applicant) v. Sault Ste. Marie General Hospital, Sault Ste. Marie Plummer Memorial Public Hospital and Service Employees International Union (Respondents) v. Group of Employees (Objectors); Service Employees Union Local 268, Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Sault Ste. Marie General Hospital, Sault Ste. Marie Plummer Memorial Public Hospital, and Ontario Public Service Employees Union (Respondents) v. Group of Employees (Objectors) (*Granted*)

0510-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Durso Steel Limited, New Era Steel Inc. (Respondents) (*Withdrawn*)

0798-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Altracon Construction Limited, Gaspo Construction Limited, Ashworth Engineering Inc., Altracon Construction Company Inc. and Pamina Construction Inc. (Respondents) (*Endorsed Settlement*)

1612-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Gaspo Construction Limited, Ashworth Engineering Inc., Pamina Construction Inc., Kebrelle Management Inc., Kebrelle Developments Inc., Geoffrey Thomas, Gabriel Spoletini (Respondents) (*Endorsed Settlement*)

1780-94-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. The Regional Municipality of Ottawa-Carleton and Incorporated Synod of the Diocese of Ottawa, Anglican Diocese of Canada (Respondents) v. Canadian Union of Public Employees, Local 3181 (Intervener) (*Endorsed Settlement*)

2050-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Ontario Pipe Trades Council") (Applicant) v. Dynamic Power Excavating Ltd./Dynamic Plumbing and Fire Protection Co. Ltd., Intercontinental Plumbing and Fire Protection Co. Ltd. (Respondents) (*Granted*)

2098-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 506 (Applicant) v. 723926 Ontario Ltd., c.o.b. as J.J. McGuire General Contractors and J.J. Green Construction Co. and J.J. Green Construction Inc. (Respondents) (*Withdrawn*)

2760-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Ontario Pipe Trades Council") (Applicant) v. Leathertown Plumbing Inc. (Respondent) (*Withdrawn*)

2822-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ainsworth Electric Co. Limited, Technical Building Services Limited, 781399 Ontario Limited (Respondents) (*Endorsed Settlement*)

2920-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, ("Ontario Pipe Trades Council") (Applicant) v. Raspa Mechanical Inc. and 1098734 Ontario Inc. c.o.b. Christal Mechanical, (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3169-92-R; 3685-92-R; 3815-92-R; 0943-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction (1983) Limited and 352021 Ontario Limited (Respondents); International Union of Operating Engineers, Local 793 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Crafts-

men (Applicant) v. Aquicon Construction Co. Ltd., Bondfield Construction Company (1983) Limited and 352021 Ontario Limited (Respondents) (*Granted*)

2815-93-R; 3408-93-R: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Berkley Contracting Limited and T. Eaton Company Limited (Respondents); United Brotherhood of Carpenters and Joiners of America, Locals 494 & 18 (Applicant) v. T. Eaton Company Limited and , Eatons Contract Sales (Respondents) (*Withdrawn*)

0300-94-R: IWA Canada Local 1-2995 (Applicant) v. Hearst Forest Management Inc., Lecours Lumber Co. Limited, Malette Inc., Levesque Plywood Limited (Respondents) (*Withdrawn*)

0441-94-R; 1028-94-R: Ontario Public Service Employees Union (Applicant) v. Sault Ste. Marie General Hospital, Sault Ste. Marie Plummer Memorial Public Hospital and Service Employees International Union (Respondents) v. Group of Employees (Objectors); Service Employees Union Local 268, Affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Sault Ste. Marie General Hospital, Sault Ste. Marie Plummer Memorial Public Hospital, and Ontario Public Service Employees Union (Respondents) v. Group of Employees (Objectors) (*Granted*)

0510-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Durso Steel Limited, New Era Steel Inc. (Respondents) (*Withdrawn*)

0798-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Altracon Construction Limited, Gaspo Construction Limited, Ashworth Engineering Inc., Altracon Construction Company Inc. and Pamina Construction Inc. (Respondents) (*Endorsed Settlement*)

1612-94-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Forming & Concrete Inc., Gaspo Construction Limited, Ashworth Engineering Inc., Pamina Construction Inc., Kebrelle Management Inc., Kebrelle Developments Inc., Geoffrey Thomas, Gabriel Spoletini (Respondents) (*Endorsed Settlement*)

1780-94-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. The Regional Municipality of Ottawa-Carleton and Incorporated Synod of the Diocese of Ottawa, Anglican Diocese of Canada (Respondents) v. Canadian Union of Public Employees, Local 3181 (Intervener) (*Endorsed Settlement*)

2050-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Ontario Pipe Trades Council") (Applicant) v. Dynamic Power Excavating Ltd./Dynamic Plumbing and Fire Protection Co. Ltd., Intercontinental Plumbing and Fire Protection Co. Ltd. (Respondents) (*Granted*)

2098-94-R: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 506 (Applicant) v. 723926 Ontario Ltd., c.o.b. as J.J. McGuire General Contractors and J.J. Green Construction Co. and J.J. Green Construction Inc. (Respondents) (*Withdrawn*)

2760-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("Ontario Pipe Trades Council") (Applicant) v. Leathertown Plumbing Inc. (Respondent) (*Withdrawn*)

2822-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Ainsworth Electric Co. Limited, Technical Building Services Limited, 781399 Ontario Limited (Respondents) (*Endorsed Settlement*)

2920-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, ("Ontario Pipe Trades Council") (Applicant) v. Raspa Mechanical Inc. and 1098734 Ontario Inc. c.o.b. Christal Mechanical, (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2698-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Applicant) v. Canadian Pacific Hotels Corporation (Chateau Laurier) (Respondent) (*Granted*)

SUCCESSOR RIGHTS/CONTRACT SERVICES

1874-94-R: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. as Metropol Security and Warren Protective Services Ltd. (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1974-94-R: Kevin Penfound, Mike Deruitter, James Kok (Applicants) v. Canadian Automobile, Aerospace and Agricultural Implement Workers of Canada, Local 27 (Respondent) v. Highbury Ford Sales Limited (Intervener)

Unit: "all employees of Highbury Ford Sales Limited in London, save and except Tower Operator, Manager, Service Advisers, Foremen, persons above the rank of Foreman, office and sales staff" (28 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	14

2293-94-R: Brenda Payne (Applicant) v. Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F. of L., C.I.O., C.L.C. (Respondent) v. 928793 Ontario Inc. operating as Canada Tavern (Intervener) Unit: "all full-time and part-time male and female employees employed in the Beverage Departments in the licensed establishment hereto as tapmen, bartenders, beverage waiters (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

2353-94-R: Rick Ellis (Applicant) v. United Steelworkers of America (Respondent) v. Bainsteel Incorporated (Intervener)

Unit: "all employees at Bainsteel Incorporated working in York Region, save and except foremen, persons above the rank of foreman, office staff and truck drivers" (23 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	14

2426-94-R: Alfredo Julio Panart (Applicant) v. Labourer's International Union of North America, Local #183 (Respondent) v. M.T.C.C. 983 (Intervener)

Unit: "all employees of M.T.C.C. 983 engaged in cleaning and maintenance at River Ridge Condominiums, No. 1 and 3 Hickory Tree Road, Weston, save and except Resident Superintendents, persons above the rank of Resident Superintendent, clerical, sales staff and security personnel" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5

2692-94-R: Maria Racioppo (Applicant) v. Canadian Union of Public Employees, Local 3546 (Respondent) (*Dismissed*)

2756-94-R: James Brennen (Applicant) v. Service Employees Union Local 183 (Respondent) v. Fieldcrest Asset Management Limited (Intervener)

Unit: "all employees of Fieldcrest Asset Management Limited employed at 95, 97 and 99 Sydney Street in the City of Belleville, save and except Managers, persons above the rank of Manager and office and clerical staff" (5 employees in unit) (*Granted*)

2765-94-R: Rebecca Millar and Stacy Fenn (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America, Local 448 (Respondent) v. Wendy's Restaurants of Canada Inc. (Intervener)

Unit: "all employees of Wendy's Restaurants of Canada Inc. at 243 Oxford Street East, London, Ontario, save and except Shift Coordinators and persons above the rank of Shift Coordinator" (37 employees in unit) (*Dismissed*)

2869-94-R: Anda Li (Applicant) v. United Steelworkers of America Local 8300 (Respondent) v. Immigrant Women's Health Centre (Intervener) (*Granted*)

3004-94-R: Employees of Arrow Games (Applicant) v. Teamsters Local Union 419 (Respondent) v. Arrow Games Inc. (Intervener) (*Granted*)

3027-94-R: Barbara Rivard (Applicant) v. United Food & Commercial Workers International Union, Locals 175/633 (Respondent) v. 988421 Ontario Inc. (Intervener) (*Withdrawn*)

3110-94-R: Elizabeth Byars, of Customs Excise Union Douanes Accise, National Office Support Staff and other members (5) of the Bargaining Unit (Applicant) v. Office of Professional Employees International Union, Local 225 (Respondent) v. Customs Excise Union Douanes Accise (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1906-94-U: Apex Woodworking Company Inc. (Applicant) v. United Brotherhood of Carpenters & Joiners of America Local Union #1072, Walter Oliveira (Respondents) (*Terminated*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3334-94-U: United Steelworkers of America (Applicant) v. Seeburn Division of Ventra Group Inc. (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3159-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 187 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0549-93-U: The Canadian Union of Public Employees and its Local 1996 (Applicant) v. The Toronto Public Library Board (Respondent) (*Withdrawn*)

1157-93-U: Roger Beamish (Applicant) v. Canadian Union and Public Employees - CLC (Respondent) v. Ontario Hydro Employees' Union, Local 1000 (Intervener) (*Dismissed*)

3818-93-U: Lloyd Charles (Applicant) v. Service Employees' International Union, Local 204 (Respondent) v. Lyndhurst Hospital (Intervener) (*Withdrawn*)

0216-94-U: Fraser MacLeod (Applicant) v. Harold Love on his own behalf and on behalf of the United Steel Workers of America, Local 6600 (Respondent) v. Inco Limited (Intervener) (*Withdrawn*)

0356-94-U: London Terminal Employees' Association (Applicant) v. Suncor, Sunoco Group, Sunoco Inc. (Respondent) (*Dismissed*)

1039-94-U; 3064-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 525 (Applicant) v. Bartek Ingredients Inc. (Respondent); National Automobile, Aerospace, Transportation and General Workers Union (CAW-Canada) and its Local 525 (Applicant) v. Bartek Ingredients Inc. (Respondent) (*Withdrawn*)

1046-94-U: Service Employees' Union, Local 210 (Applicant) v. Chateau Park Nursing Home (Respondent) (*Withdrawn*)

1314-94-U: Paula Egan and Canadian Union of Public Employees, Local 2204 (Applicant) v. ABC Daycare (c.o.b. as ABC Infant and Toddler Centre of Ottawa) (Respondent) (*Withdrawn*)

1336-94-U: Valrie Gaynor (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Dismissed*)

1503-94-U: Harry Dhanraj (Applicant) v. Graphic Communication International Union Local N-1 (Respondent) v. American National Can Canada Inc. (Intervener) (*Dismissed*)

1514-94-U: Kingston Typographical Union, No. 204, Printing, Publishing and Media Workers Sector of the Communications Workers of America, 14018 (Applicant) v. Whig-Standard Company Ltd. (Respondent) (*Withdrawn*)

1611-94-U: Victoria Shymlosky (Applicant) v. The Ontario Public School Teachers' Federation (Hamilton District) (Respondent) v. The Board of Education for the City of Hamilton (Intervener) (*Withdrawn*)

1613-94-U: Ontario Public Service Employees Union (Applicant) v. Women's Shelter of Georgina, Inc. (Respondent) (*Withdrawn*)

1775-94-U: Former and Present Employees of Dominion Sav-a-Centre #702 (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America and its Local 414 (Respondent) v. The Great Atlantic & Pacific Company of Canada, Limited (Intervener) (*Dismissed*)

1886-94-U: Apex Woodworking Company Inc. (Applicant) v. United Brotherhood of Carpenters & Joiners of America Local Union #1072 and Walter Oliveira (Respondents) (*Terminated*)

1913-94-U: Service Employees' Union, Local 210 (Applicant) v. International Care Corporation o/a Chateau Park Nursing Home (Respondent) (*Withdrawn*)

1964-94-U; 1965-94-U; 1966-94-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 1000 and 1688 (Applicant) v. Metro Cab Company Limited et al (Respondent); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Locals 414, 422, 440, 448, 461, 483, 1000 and 1688 (Applicant) v. Associated Toronto Taxi-Cab Co-Operative Limited et al (Respondent); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America Locals 414, 422, 440, 448, 461, 483, 1000 and 1688 (Applicant) v. Diamond Taxicab Association (Toronto) Limited et al (Respondent) (*Withdrawn*)

2111-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Granted*)

2295-94-U: Vicky Pusut, Mary Jane Currah, Elaine Ikert (Applicant) v. Service Employees Union-Local 210, Charlotte Eleanor Englehart Hospital (Respondents) (*Withdrawn*)

2327-94-U: Mr. Michael Shine (Applicant) v. International Woodworkers Association Local 2693 (Respondent) v. Douglas Haney (Intervener) (*Withdrawn*)

2372-94-U: Richard Bene (Applicant) v. International Brotherhood of Painters and Allied Trades (Respondent) (*Withdrawn*)

2515-94-U: Canadian Union of Public Employees Local 1001 (Applicant) v. University of Windsor (Respondent) (*Withdrawn*)

2558-94-U: Graphic Communications International Union, Local 500M (Applicant) v. Quebecor Printing PE & E (Respondent) (*Withdrawn*)

2642-94-U: Canadian Union of Public Employees, Local 229 (Applicant) v. Marriott Management Services (at Queen's University) (Respondent) (*Withdrawn*)

2665-94-U: International Ladies' Garment Workers' Union (Applicant) v. Bigi Canada Ltd. (Respondent) (*Terminated*)

2759-94-U: Stephen J. McCormack (Applicant) v. International Brotherhood of Painters and Allied Trades District Council 46 and Aquablast Corporation (Respondents) (*Withdrawn*)

2763-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. The Live Entertainment Corporation of Canada (Respondent) (*Withdrawn*)

2782-94-U: Robert Langer (Applicant) v. Uniroyal Goodrich Canada Inc. (Respondent) (*Dismissed*)

2837-94-U: Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Eastern Power Developers Corp. (Respondent) (*Granted*)

2862-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Limited (Respondent) (*Withdrawn*)

2916-94-U: Helen Murray (Applicant) v. Canadian Union of Public Employees and its Local 2544 (Respondent) (*Dismissed*)

2937-94-U: Canadian Union of Public Employees - Local 3721 (Applicant) v. Marianhill (Respondent) (*Withdrawn*)

2948-94-U: IWA-Canada (Applicant) v. Fred Murphy Pembroke (1982) Limited (Respondent) (*Withdrawn*)

2955-94-U: Graphic Communications International Union, Local N-1 (Applicant) v. The Print Key Inc. and Frank Smith (Respondent) (*Withdrawn*)

2956-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

2959-94-U: Dwight J. Sernoskie (Applicant) v. United Plant Guard Workers of America Local 1956 (Respondent) (*Dismissed*)

3005-94-U: IWA Canada (Applicant) v. Earnway Industries (Canada) Ltd. (Respondent) (*Endorsed Settlement*)

3026-94-U: Suzanne Varey (Applicant) v. Canadian Union of Public Employees Local 57 (Respondent) v. Guelph General Hospital (Intervener) (*Withdrawn*)

3049-94-U: Lisa Anne Brown (Applicant) v. 3M Canada (Respondent) (*Dismissed*)

3058-94-U: Labourers' International Union of North America, Local 1081 (Applicant) v. Emonts Masonry Construction Limited (Respondent) (*Withdrawn*)

3084-94-U: Bryan Rouse (Applicant) v. Westburne Industrial Ent. Ltd. (Respondent) (*Dismissed*)

3088-94-U: Murray James Ecclestone (Applicant) v. Local Union 3789 (Respondent) (*Dismissed*)

3093-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Electro Arts Ltd. (Respondent) (*Withdrawn*)

3119-94-U: United Steelworkers of America (Applicant) v. Image 2000 Inc. (Respondent) (*Withdrawn*)

3138-94-U: Maurice Wayne Shevalier (Applicant) v. Sutherland Schultz Ltd. Insulation Division "Jat Pfaff" and Local 95 International Ass. of Heat & Frost Insulators & Asbestos Workers (Respondents) (*Dismissed*)

3139-94-U: Curtis J. Hay (Applicant) v. The Crop Insurance Commission of Ontario, The Ontario Public Service Employees Union, The Crown in Right of Ontario, The Ministry of Agriculture, Food & Rural Affairs, The Ontario Public Service Labour Relations Tribunal, The Government of Canada (Respondents) (*Dismissed*)

3150-94-U: E. Gail Conrad (Applicant) v. Service Employees Union, Local 478 (Respondent) (*Dismissed*)

3156-94-U: Rocco Pietrangelo (Applicant) v. Teamsters Local Union #230, and Teskey Construction Co. Ltd. (Respondents) (*Dismissed*)

3158-94-U: Rita Neuman (Applicant) v. Eddy Match Co. Ltd., Local 2000, Eddy Match Division and United Brotherhood of Carpenters and Joiners of America (Respondents) (*Withdrawn*)

3177-94-U: Ennio Astri (Applicant) v. Canadian Pacific/Canadien Pacifique (Respondent) (*Dismissed*)

3184-94-U: Canadian Union of Postal Workers (Applicant) v. Tanat Canada (Respondent) (*Withdrawn*)

3191-94-U: Brendan Reilly (Applicant) v. L.I.U.N.A. Local 183 (Respondent) (*Dismissed*)

3197-94-U: United Food & Commercial Workers International Union (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent) (*Withdrawn*)

3218-94-U: Pat Vescio (Applicant) v. Metallos (Respondent) (*Dismissed*)

3236-94-U: Service Employees International Union (Applicant) v. Kleenway Building Maintenance Services Co. (Respondent) (*Dismissed*)

3266-94-U: Sukhdev K. Gill (Applicant) v. International Woodworkers Association (IWA) (Respondent) (*Dismissed*)

3269-94-U: Sukhdev K. Gill (Applicant) v. Kimberly Clark (Respondent) (*Dismissed*)

3312-94-U: Cecil Colgan (Applicant) v. Harry Hall - Aberfoyle Metal Treathers (Respondent) (*Dismissed*)

3329-94-U: Ontario Public Service Employees Union (Applicant) v. Double M & M Inc. (Respondent) (*Withdrawn*)

3335-94-U: United Steelworkers of America (Applicant) v. Seeburn Division of Ventra Group Inc. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

2123-94-M: United Steelworkers of America (Applicant) v. Bannerman Enterprises Inc. (Respondent) (*Terminated*)

2320-94-M: Sheetmetal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Mount Royal Contracting, Mount Royal Concrete Floor (Canada) Ltd., Water-Shed Industrial Roofing Limited, Brazeau & Mickissock Roofing, Brazeau Roofing, Gordon Mckissock Roofing, Toitures Gord. Mckissock Roofing, 1029869 Ontario Inc. c.o.b. as Brazeau & Mckissock Roofing or alternatively, Gordon Mckissock Roofing or in the further alternative Brazeau Mckissock Roofing, Gordon Mckissock, Fern Brazeau, 2867389 Canada Inc., v. (Respondents) (*Withdrawn*)

3041-94-M: Canadian Union of Public Employees Local 94 (Applicant) v. Corporation of the City of North York (Respondent) (*Dismissed*)

3059-94-M: Labourers' International Union of North America, Local 1081 (Applicant) v. Emonts Masonry Construction Limited (Respondent) (*Withdrawn*)

3101-94-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Electro Arts Ltd. (Respondent) (*Endorsed Settlement*)

3170-94-M: United Food & Commercial Workers International Union (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent) (*Granted*)

3185-94-M: Canadian Union of Postal Workers (Applicant) v. Tanat Canada, a Division of G.D. Express Worldwide Canada Inc. (Respondent) (*Dismissed*)

3261-94-M: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F of L., C.I.O. and C.L.C. (Applicant) v. Roach's Red and White Taxi (Respondent) (*Withdrawn*)

3286-94-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Applicant) v. The Brick Warehouse Corporation (Respondent) (*Dismissed*)

3328-94-M: Ontario Public Service Employees Union (Applicant) v. Double M & M Inc. (Respondent) (*Withdrawn*)

3333-94-M: United Steelworkers of America (Applicant) v. Seeburn Division of Ventra Group Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3176-94-M: Susan Pauline Steckley (Applicant) v. Ontario Nurses' Association (ONA), Kitchener-Waterloo Hospital (Respondents) (*Withdrawn*)

JURISDICTIONAL DISPUTES

0554-94-JD: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Ontario Sheet Metal Workers' & Roofers' Conference, Electrical Power Systems Construction Association, Interprovincial Insulation Inc., Crosby Insulations (London) Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1944-94-M: Board of Governors of Algoma University College (Applicant) v. Algoma University College Staff Association (Respondent) (*Granted*)

2945-94-M: Canadian Union of Public Employees - Local 3721 (Applicant) v. Marianhill (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1208-94-OH: Howard Scott Cole (Applicant) v. Babbco Office Services Limited (Respondent) (*Withdrawn*)

2386-94-OH: James Baker (Applicant) v. M & J Meat Distributors Inc. (Respondent) (*Endorsed Settlement*)

2778-94-OH: Jim Flowersmith (Applicant) v. Hydraulic House Ltd. (Respondent) (*Withdrawn*)

2891-94-OH: Andrea Lofquist (Applicant) v. Trattoria Fornello (Respondent) (*Withdrawn*)

2962-94-OH: Sandra Tobin Mann (Applicant) v. Greenfield Plastics Corporation (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

3182-88-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastern Construction Company Limited (Respondent) (*Terminated*)

2901-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) v. Frank Kacsandi (Intervener) (*Dismissed*)

1989-93-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 12 Kitchener (Applicant) v. D & D Masonry (Respondent) (*Endorsed Settlement*)

2814-93-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. T. Eaton Company Ltd. (Respondent) (*Withdrawn*)

3211-93-G; 3212-93-G: Sheet Metal Workers' International Association, Local 269 (Applicant) v. Electrical Power Systems Construction Association, Interprovincial Insulation Inc. (Respondents) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener); Sheet Metal Workers' International Association, Local 539 (Applicant) v. Electrical Power Systems Construction Association, Crosby Insulations (London) Ltd. (Respondents) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener) (*Withdrawn*)

3667-93-G; 0919-94-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Locals 1946 and 785 (Applicants)

v. Gaspo Construction Ltd., Ashworth Engineering Inc., Altracon Construction Ltd. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 1316 (Applicant) v. Gaspo Construction Ltd., Ashworth Engineering Inc., Altracon Construction Ltd., Central Forming and Concrete Inc., Pamina Construction Inc. (Respondents) (*Endorsed Settlement*)

0094-94-G: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Thornhill Glass & Mirror Inc. and 975866 Ontario Limited c.o.b. as Tagg Industries (Respondents) (*Withdrawn*)

0511-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Durso Steel Limited, New Era Steel Inc. (Respondents) (*Withdrawn*)

1357-94-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 25 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. T. Zussino Construction Ltd. (Respondent) (*Endorsed Settlement*)

1440-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Systemes Interieurs Pro-Pose Inc. (Respondent) (*Endorsed Settlement*)

2099-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. 723926 Ontario Limited, c.o.b. as J.J. McGuire General Contractors and J.J. Green Construction Inc. (Respondents) (*Withdrawn*)

2162-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Devon Construction Limited (Respondent) (*Endorsed Settlement*)

2257-94-G; 3007-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cellino Contracting Ltd. & F.R. Paving Co. Ltd. (Respondents) (*Endorsed Settlement*)

2331-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.T.C. Flooring Ltd. (Respondent) (*Endorsed Settlement*)

2463-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. B & D Insulation Inc. (Respondent) (*Granted*)

2514-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Tacc Construction Co. Ltd. (Respondent) (*Withdrawn*)

2568-94-G: International Union of Bricklayers and Allied Craftsmen Local #4, Ontario (Applicant) v. Q Tech Limited (Respondent) (*Withdrawn*)

2635-94-G: International Brotherhood of Electrical Workers Local 105 (Applicant) v. Vol Electric Limited (Respondent) (*Endorsed Settlement*)

2754-94-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Abroyd Communications Inc. and The Electrical Power Systems Construction Association ("EPSCA") (Respondents) (*Withdrawn*)

2761-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Leathertown Plumbing Inc. (Respondent) (*Withdrawn*)

2776-94-G: International Brotherhood of Electrical Workers Local 353 (Applicant) v. Ainsworth Electric Co. Limited, Technical Building Services Limited, 781399 Ontario Limited (Respondents) (*Endorsed Settlement*)

2817-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Lakehead Roofing and Sheet Metal Co. (1983) Ltd. (Respondent) (*Endorsed Settlement*)

2840-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Carmen Drywall Service (Respondent) (*Endorsed Settlement*)

2855-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. A. Buchanan Floor Coverings Ltd. (Respondent) (*Endorsed Settlement*)

2857-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Clarkson Construction Company Limited; Bot Construction (Canada) Limited (Respondents) (*Withdrawn*)

2902-94-G: Labourers' International Union of North America, Local 527 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Endorsed Settlement*)

2919-94-G: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, ("Ontario Pipe Trades Council") (Applicant) v. Raspa Mechanical Inc. and 1098734 Ontario Inc. c.o.b. Christal Mechanical, (Respondents) (*Withdrawn*)

2929-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Centre Leasehold Improvements Ltd. (Respondent) (*Endorsed Settlement*)

2942-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Emco Masonry Limited (Respondent) (*Withdrawn*)

2944-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Skyline Construction Masonry Limited (Respondent) (*Endorsed Settlement*)

2950-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Banforming 1991 Inc. (Respondent) (*Endorsed Settlement*)

2951-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Per-Form Construction Ltd. (Respondent) (*Endorsed Settlement*)

2953-94-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Helm Brothers Contracting Ltd. (Respondent) (*Withdrawn*)

2971-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Commercial Contracting Inc. (Respondent) (*Withdrawn*)

2972-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Blockline Contracting (Respondent) (*Withdrawn*)

2990-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terrazzo Mosaic & Tile Co. Ltd. (Respondent) (*Endorsed Settlement*)

3023-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Nation Drywall Ltd. (Respondent) (*Terminated*)

3025-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Chalkboard Installation (Respondent) (*Endorsed Settlement*)

3030-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Canadian Rogers Eastern Limited (Respondent) (*Endorsed Settlement*)

3035-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marli Mechanical Ltd. (Respondent) (*Withdrawn*)

3036-94-G: The International Brotherhood of Painters and Allied Trades, Glaziers and Metal Mechanics, Local Union 1671 (Applicant) v. Henderson Glass (Lakehead) Limited c.o.b. as Henderson Glass Works (Lakehead) Ltd. (Respondent) (*Endorsed Settlement*)

3039-94-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Delro Metal Erectors Ltd. (Respondent) (*Endorsed Settlement*)

3044-94-G: United Brotherhood of Carpenters Local 786 (Applicant) v. Formcrete Contracting Ltd. (Respondent) (*Endorsed Settlement*)

3046-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. R. Blais et Fils Inc. (Respondent) (*Withdrawn*)

3067-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Royal Forming (1994) Limited (Respondent) (*Granted*)

3068-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Amlan Landscaping Inc. (Respondent) (*Granted*)

3070-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (*Withdrawn*)

3076-94-G: International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Q Tech Limited (Respondent) (*Withdrawn*)

3080-94-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Wm. J. Davidson Electric Inc. Standard Lighting Company (Respondent) (*Endorsed Settlement*)

3112-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. 806419 Ontario Inc. (Respondent) (*Endorsed Settlement*)

3118-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acme Steel Shelving Corp. (Respondent) (*Withdrawn*)

3121-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Continental Acoustic & Drywall Inc. (Respondent) (*Endorsed Settlement*)

3124-94-G; 3125-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. John Paul Construction (Respondent) (*Withdrawn*)

3126-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Majestic International Marketing Group Inc. and Majestic Interior Systems and Demo Inc. (Respondents) (*Withdrawn*)

3133-94-G: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Elmara Construction (Respondent) (*Withdrawn*)

3134-94-G: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Special Foundations Systems Company (Respondent) (*Withdrawn*)

3137-94-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. Calorific Construction Limited (Respondent) (*Withdrawn*)

3179-94-G: United Brotherhood of Carpenters and Joiners of America, Locals 1316 and 1946 (Applicant) v. Carwood Store Fixtures Limited (Respondent) (*Endorsed Settlement*)

3206-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Cam Steel Limited (Respondent) (*Withdrawn*)

3207-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463 (Applicant) v. J.T. Mechanical Contracting (Respondent) (*Withdrawn*)

3208-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Unic Drywall and Brothers Drywall Ltd. (Respondents) (*Withdrawn*)

3295-94-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Pino Drywall Construction Limited (Respondent) (*Endorsed Settlement*)

3309-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)

3347-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. D. Lafreniere Builders Ltd. (Respondent) (*Endorsed Settlement*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

1103-93-M: Service Employees Union, Local 268 (Applicant) v. George Jeffrey Children's Treatment Centre (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1248-93-R: Retail, Wholesale and Department Store Union, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC and its local affiliates Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 414, 429, 545, 579, 582, 915 and 991 (Intervener) (*Dismissed*)

1458-93-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. Conego Construction Ltd. (Respondent) (*Denied*)

1985-93-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and The Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicant) v. Bayritz Construction Ltd. and Bayritz Masonry Ltd. and Dakota Masonry Ltd. and 986153 Ontario Ltd. c.o.b. as Yellow Brick Masonry, Sundial Bricklayers Inc. (Respondents) (*Denied*)

3664-93-U: Jack Vernon et al, (Applicant) v. CAW-Canada Local No. 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Denied*)

0548-94-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. James Johnston Mechanical Contracting Ltd. (Respondent) (*Denied*)

1588-94-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Nova Ceramic (Respondent) (*Dismissed*)

1842-94-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Phoenix Elevator Inc. (Respondent) (*Withdrawn*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CA20N
LR
-054

ONTARIO LABOUR RELATIONS BOARD REPORTS

February 1995



ONTARIO LABOUR RELATIONS BOARD

Chair

J. McCORMACK

Alternate Chair

R.O. MACDOWELL

Vice-Chairs

C. ALBERTYN

M. BENDEL

J.B. BLOCH

P. CHAPMAN

L. DAVIE

N.V. DISSANAYAKE

D. GEE

R.G. GOODFELLOW

B. HERLICH

R.J. HERMAN

R.D. HOWE

M. KAYE JOACHIM

J. JOHNSTON

B. KELLER

P. KNOPF

J. KOVACS

S. LIANG

G. MISRA

M.A. NAIRN

K. O'NEIL

K. PETRYSHEN

N.B. SATTERFIELD

L. SHOULDICE

I.M. STAMP

R. STOYKEWYCH

G. SURDYKOWSKI

L. TRACHUK

Members

B.L. ARMSTRONG

W.A. CORRELL

K.S. DAVIES

A.R. FOUCAULT

W.N. FRASER

P.V. GRASSO

V. HARRIS

A. HERSHKOVITZ

J. IRVINE

J. KENNEDY

S. LAING

J. LEAR

C. McDONALD

O. McGUIRE

G. McMENEMY

R.R. MONTAGUE

J.W. MURRAY

D.A. PATTERSON

H. PEACOCK

R.W. PIRRIE

F.B. REAUME

J. REDSHAW

J.A. RONSON

J.A. RUNDLE

D. RYAN

P. SEVILLE

R.M. SLOAN

M. SULLIVAN

J. TRIM

M. VUKOBRAT

R. WEISS

W.H. WIGHTMAN

D.G. WOZNIAK

Registrar

T.A. INNISS

Board Solicitors

K. HESHKA

R. LEBI

K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1995] OLRB REP. FEBRUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1. Charterways Transportation Limited, The Corporation of the Town of Ajax; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222.....	95
2. Collegiate Sports Experts, Sports Experts Inc. c.o.b. Mega Collegiate Sports Experts and; Re UFCW, Local 175	96
3. Ivan Cvick; Re Schneider Employees Association; Re J.M. Schneider Inc.	105
4. D'Luxe Drywall (1987), 737049 Ontario Ltd. o/a; Re Drywall Acoustic Lathing and Insulation Local 675	112
5. FMG Timberjack Inc.; Re Glass, Molders, Pottery, Plastics & Allied Workers International Union	115
6. Frade's Fruit Ltd.; Re UFCW, Local 175	122
7. G.S. Dunn & Co. Limited; Re Teamsters Local Union No. 879	128
8. Jones Wood Industries Inc.; Re CJA, Local 1072; Re Group of Employees.....	134
9. La Co-opérative De Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais; Re UFCW, Local 278W, and CJA, Local 3054; Re United Co-operative of Ontario and UCO Petroleum Inc.; Re Group of Employees	138
10. Robertson Yates Corporation Limited; Re CJA, Local Union 785; Re LIUNA.....	158
11. Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A.; Re UFCW, Local 175	166
12. The Great Atlantic and Pacific Company of Canada Limited; Re Donna Glover et al; Re UFCW, Locals 175 and 633.....	178
13. The Municipality of Metropolitan Toronto; Re CUPE, Local 79	182
14. Tim Horton Donuts, Market Drive Donuts Ltd., c.o.b. as; Re USWA; Re Group of Employees	187
15. Unit Park; Re LIUNA, Local 183	190
16. Windsor Casino Limited; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)	206
17. Z-Lite Jenamees; Re Amalgamated Clothing and Textiles Workers' Union, AFL-CIO-CLC	212

COURT PROCEEDINGS

1. Royalguard Vinyl Co., a Division of Royplast Limited; Re USWA, Samuel Ofosu Ansah and OLRB	227
---	-----

SUBJECT INDEX

- Bargaining Rights - Bargaining Unit - Combination of Bargaining Units - Termination - Timeliness - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed
- SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW, LOCAL 175 166
- Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Termination - Timeliness - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed
- SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW, LOCAL 175 166
- Bargaining Unit - Certification - Employer operating 6 retail stores in Metropolitan Toronto - Union applying to represent employees at single location - Employer asserting that only municipality-wide unit appropriate, and that single store unit would create serious labour relations problems because of employer's reliance upon frequent and regular flow of employees from one store to another in order to meet customer requirements - Board finding union's proposed bargaining unit appropriate - Interim certificate issuing
- COLLEGIATE SPORTS EXPERTS, SPORTS EXPERTS INC. C.O.B. MEGA COLLEGIATE SPORTS EXPERTS AND; RE UFCW, LOCAL 175 96
- Bargaining Unit - Certification - Security Guards - Board finding that bargaining unit consisting solely of casino's surveillance staff constituting appropriate bargaining unit
- WINDSOR CASINO LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) 206
- Bargaining Unit - Combination of Bargaining Units - Board in earlier decision finding that monitoring of other employees by security officers employed by municipality raising real possibility of conflict of interest if security officers included in municipality's full-time bargaining unit - Union now seeking to combine newly certified bargaining unit of security officers with existing full-time bargaining unit - Board not prepared to grant application where statutory preconditions outlined in section 6(6) of the Act are met - Application to combine bargaining units dismissed
- THE MUNICIPALITY OF METROPOLITAN TORONTO; RE CUPE, LOCAL 79..... 182
- Bargaining Unit - Combination of Bargaining Units - Remedies - Board in earlier decision directing combination of employer's "parts" and "manufacturing" bargaining units and remaining seized with respect to remedial issues - Employer and union subsequently asking Board to determine unresolved seniority integration issue under section 7(5) of the Act - Board directing that seniority lists be "dovetailed" and that employees of both former "parts" and

“manufacturing” bargaining units be credited with seniority from date of hire with the employer

FMG TIMBERJACK INC.; RE GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION 115

Certification - Bargaining Unit - Employer operating 6 retail stores in Metropolitan Toronto - Union applying to represent employees at single location - Employer asserting that only municipality-wide unit appropriate, and that single store unit would create serious labour relations problems because of employer's reliance upon frequent and regular flow of employees from one store to another in order to meet customer requirements - Board finding union's proposed bargaining unit appropriate - Interim certificate issuing

COLLEGIATE SPORTS EXPERTS, SPORTS EXPERTS INC. C.O.B. MEGA COLLEGIATE SPORTS EXPERTS AND; RE UFCW, LOCAL 175 96

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Employee - Board finding lead hand, who was primary in-house organizer for union, to be “employee” within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours

Z-LITE JENAMEES; RE AMALGAMATED CLOTHING AND TEXTILES WORKERS' UNION, AFL-CIO-CLC..... 212

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Thunder Bay employer asserting inability to finance conduct of proceedings in Toronto and declining to attend hearing into union's certification application and unfair labour practice complaint - Board explaining its travel policy in respect of “fast-track” cases - On basis of uncontradicted evidence, Board finding employer in violation of Act in discharging key union organizer and known union supporter - Reinstatement ordered - Union certified under section 9.2 of the Act

FRADE'S FRUIT LTD.; RE UFCW, LOCAL 175 122

Certification - Charges - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA, SAMUEL OFOSU ANSAH AND OLRB..... 230

Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because

employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing	
TIM HORTON DONUTS, MARKET DRIVE DONUTS LTD., C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES	187
Certification - Constitutional Law - Reconsideration - Employer's business including operation of mustard seed elevators - Employer seeking reconsideration of decision certifying union on ground that labour relations of employer falling in federal jurisdiction - Board not accepting argument that elevators operated by employer equivalent to elevators declared to be works for the general advantage of Canada under <i>Canada Grain Act</i> in that they perform similar function and should therefore also be found within federal jurisdiction - Board satisfied that employer's labour relations properly subject to provincial regulation - Reconsideration application dismissed	
G.S. DUNN & CO. LIMITED; RE TEAMSTERS LOCAL UNION NO. 879.....	128
Certification - Evidence - Membership Evidence - Practice and Procedure - Evidence before Board disclosing that individual whose name appeared as "witness" on union's membership evidence did not actually see employees sign their cards - Board dismissing union's motion that it not inquire further into matter as raising no prima facie case of misconduct or irregularity - Board, however, not agreeing that evidence before it making out prima facie case warranting inquiry into Form A-4 filed by union	
JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES	134
Certification - Bargaining Unit - Security Guards - Board finding that bargaining unit consisting solely of casino's surveillance staff constituting appropriate bargaining unit	
WINDSOR CASINO LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)	206
Certification Where Act Contravened - Certification - Discharge - Discharge for Union Activity - Employee - Board finding lead hand, who was primary in-house organizer for union, to be "employee" within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours	
Z-LITE JENAMEES; RE AMALGAMATED CLOTHING AND TEXTILES WORK- ERS' UNION, AFL-CIO-CLC	212
Certification Where Act Contravened - Certification - Discharge - Discharge for Union Activity - Thunder Bay employer asserting inability to finance conduct of proceedings in Toronto and declining to attend hearing into union's certification application and unfair labour practice complaint - Board explaining its travel policy in respect of "fast-track" cases - On basis of uncontradicted evidence, Board finding employer in violation of Act in discharging key union organizer and known union supporter - Reinstatement ordered - Union certified under section 9.2 of the Act	
FRADE'S FRUIT LTD.; RE UFCW, LOCAL 175	122
Charges - Certification - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to	

obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA,
SAMUEL OFOSU ANSAH AND OLRB 230

Charges - Certification - Evidence - Intimidation and Coercion - Membership Evidence - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing

TIM HORTON DONUTS, MARKET DRIVE DONUTS LTD., C.O.B. AS; RE USWA;
RE GROUP OF EMPLOYEES 187

Combination of Bargaining Units - Bargaining Unit - Bargaining Rights - Termination - Timeliness - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed

SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW,
LOCAL 175 166

Combination of Bargaining Units - Bargaining Unit - Board in earlier decision finding that monitoring of other employees by security officers employed by municipality raising real possibility of conflict of interest if security officers included in municipality's full-time bargaining unit - Union now seeking to combine newly certified bargaining unit of security officers with existing full-time bargaining unit - Board not prepared to grant application where statutory preconditions outlined in section 6(6) of the Act are met - Application to combine bargaining units dismissed

THE MUNICIPALITY OF METROPOLITAN TORONTO; RE CUPE, LOCAL 79 182

Combination of Bargaining Units - Bargaining Unit - Remedies - Board in earlier decision directing combination of employer's "parts" and "manufacturing" bargaining units and remaining seized with respect to remedial issues - Employer and union subsequently asking Board to determine unresolved seniority integration issue under section 7(5) of the Act - Board directing that seniority lists be "dovetailed" and that employees of both former "parts" and "manufacturing" bargaining units be credited with seniority from date of hire with the employer

FMG TIMBERJACK INC.; RE GLASS, MOLDERS, POTTERY, PLASTICS &
ALLIED WORKERS INTERNATIONAL UNION 115

Constitutional Law - Certification - Reconsideration - Employer's business including operation of mustard seed elevators - Employer seeking reconsideration of decision certifying union on ground that labour relations of employer falling in federal jurisdiction - Board not accepting argument that elevators operated by employer equivalent to elevators declared to be works for the general advantage of Canada under *Canada Grain Act* in that they perform similar function and should therefore also be found within federal jurisdiction - Board satisfied that

employer's labour relations properly subject to provincial regulation - Reconsideration application dismissed	
G.S. DUNN & CO. LIMITED; RE TEAMSTERS LOCAL UNION NO. 879.....	128
Constitutional Law - Sale of a Business - Related Employer - Whether labour relations of applicant falling within federal or provincial jurisdiction - Applicant engaged in farm input and grain merchandising business - Board not persuaded that operation of grain elevators, silos, retail store and other operations at particular site sufficiently integrated into operation of feed mill and feed warehouse situated there so as to be subject to federal regulation - Work of employees at other sites not sufficiently integrated with operation of various federal works situated there to fall within federal jurisdiction - Board concluding that it has constitutional jurisdiction to hear merits of application	
LA CO-OPÉRATIVE DE POINTE-AUX-ROCHES, 1015195 ONTARIO LIMITED AND CHARLES DESMARAIS; RE UFCW, LOCAL 278W, AND CJA, LOCAL 3054; RE UNITED CO-OPERATIVE OF ONTARIO AND UCO PETROLEUM INC.; RE GROUP OF EMPLOYEES	138
Construction Industry - Construction Industry Grievance - Damages - Jurisdictional Dispute - Parties - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in <i>Sayers & Associates</i> and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed	
ROBERTSON YATES CORPORTATION LIMITED; RE CJA, LOCAL UNION 785; RE LIUNA.....	158
Construction Industry - Construction Industry Grievance - Practice and Procedure - Sale of a Business - Related Employer - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in <i>Goodman v. Rossi</i> and observing that there should be implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request	
D'LUXE DRYWALL (1987), 737049 ONTARIO LTD. O/A; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675	112
Construction Industry Grievance - Construction Industry - Damages - Jurisdictional Dispute - Parties - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in <i>Sayers & Associates</i> and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed	
ROBERTSON YATES CORPORATION LIMITED; RE CJA, LOCAL UNION 785; RE LIUNA.....	158
Construction Industry Grievance - Construction Industry - Practice and Procedure - Sale of a Business - Related Employer - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in <i>Goodman v. Rossi</i> and observing that there should be	

implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request

D'LUXE DRYWALL (1987), 737049 ONTARIO LTD. O/A; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 112

Damages - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in *Sayers & Associates* and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed

ROBERTSON YATES CORPORATION LIMITED; RE CJA, LOCAL UNION 785; RE LIUNA 158

Discharge - Certification - Certification Where Act Contravened - Discharge for Union Activity - Thunder Bay employer asserting inability to finance conduct of proceedings in Toronto and declining to attend hearing into union's certification application and unfair labour practice complaint - Board explaining its travel policy in respect of "fast-track" cases - On basis of uncontradicted evidence, Board finding employer in violation of Act in discharging key union organizer and known union supporter - Reinstatement ordered - Union certified under section 9.2 of the Act

FRADE'S FRUIT LTD.; RE UFCW, LOCAL 175 122

Discharge - Certification - Certification Where Act Contravened - Discharge for Union Activity - Employee - Board finding lead hand, who was primary in-house organizer for union, to be "employee" within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours

Z-LITE JENAMEES; RE AMALGAMATED CLOTHING AND TEXTILES WORKERS' UNION, AFL-CIO-CLC 212

Discharge - Duty of Fair Representation - Union's decision not to proceed to arbitration with complainant's discharge grievance violating Act in light of critical job interests at stake, apparent merits of grievance, union's failure to investigate complainant's story or to allow him to participate in meeting of executive and steward body, and in light of union's failure to explain its decision to the Board - Complaint allowed - Union directed to refer grievance to arbitration and employer directed to waive timelines objection

IVAN CVICEK; RE SCHNEIDER EMPLOYEES ASSOCIATION; RE J.M. SCHNEIDER INC. 105

Discharge - Just Cause - Unfair Labour Practice - Board finding that employer had just cause for discharging employee accused of breaching company ticketing and receipting procedures - Application dismissed

UNIT PARK; RE LIUNA, LOCAL 183 190

Discharge for Union Activity - Certification - Certification Where Act Contravened - Discharge - Thunder Bay employer asserting inability to finance conduct of proceedings in Toronto and declining to attend hearing into union's certification application and unfair labour practice complaint - Board explaining its travel policy in respect of "fast-track" cases - On basis of

uncontradicted evidence, Board finding employer in violation of Act in discharging key union organizer and known union supporter - Reinstatement ordered - Union certified under section 9.2 of the Act

FRADE'S FRUIT LTD.; RE UFCW, LOCAL 175 122

Discharge for Union Activity - Certification - Certification Where Act Contravened - Discharge - Employee - Board finding lead hand, who was primary in-house organizer for union, to be "employee" within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours

Z-LITE JENAMEES; RE AMALGAMATED CLOTHING AND TEXTILES WORKERS' UNION, AFL-CIO-CLC 212

Duty of Fair Representation - Discharge - Union's decision not to proceed to arbitration with complainant's discharge grievance violating Act in light of critical job interests at stake, apparent merits of grievance, union's failure to investigate complainant's story or to allow him to participate in meeting of executive and steward body, and in light of union's failure to explain its decision to the Board - Complaint allowed - Union directed to refer grievance to arbitration and employer directed to waive timelines objection

IVAN CVICEK; RE SCHNEIDER EMPLOYEES ASSOCIATION; RE J.M. SCHNEIDER INC. 105

Employee - Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Board finding lead hand, who was primary in-house organizer for union, to be "employee" within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours

Z-LITE JENAMEES; RE AMALGAMATED CLOTHING AND TEXTILES WORKERS' UNION, AFL-CIO-CLC 212

Evidence - Certification - Charges - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA, SAMUEL OFOSU ANSAH AND OLRB 230

Evidence - Certification - Charges - Intimidation and Coercion - Membership Evidence - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because

VIII

employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing

TIM HORTON DONUTS, MARKET DRIVE DONUTS LTD., C.O.B. AS; RE USWA;
RE GROUP OF EMPLOYEES 187

Evidence - Certification - Membership Evidence - Practice and Procedure - Evidence before Board disclosing that individual whose name appeared as "witness" on union's membership evidence did not actually see employees sign their cards - Board dismissing union's motion that it not inquire further into matter as raising no prima facie case of misconduct or irregularity - Board, however, not agreeing that evidence before it making out prima facie case warranting inquiry into Form A-4 filed by union

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF
EMPLOYEES 134

Intimidation and Coercion - Certification - Charges - Evidence - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA,
SAMUEL OFOSU ANSAH AND OLRB 230

Intimidation and Coercion - Certification - Charges - Evidence - Membership Evidence - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing

TIM HORTON DONUTS, MARKET DRIVE DONUTS LTD., C.O.B. AS; RE USWA;
RE GROUP OF EMPLOYEES 187

Judicial Review - Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA,
SAMUEL OFOSU ANSAH AND OLRB 230

Jurisdictional Dispute - Construction Industry - Construction Industry Grievance - Damages - Parties - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate

in hearing of section 126 application - Board applying decision in <i>Sayers & Associates</i> and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed	
ROBERTSON YATES CORPORATION LIMITED; RE CJA, LOCAL UNION 785; RE LIUNA	158
Just Cause - Discharge - Unfair Labour Practice - Board finding that employer had just cause for discharging employee accused of breaching company ticketing and receipting procedures - Application dismissed	
UNIT PARK; RE LIUNA, LOCAL 183	190
Membership Evidence - Certification - Charges - Evidence - Intimidation and Coercion - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing	
TIM HORTON DONUTS, MARKET DRIVE DONUTS LTD., C.O.B. AS; RE USWA; RE GROUP OF EMPLOYEES	187
Membership Evidence - Certification - Charges - Evidence - Intimidation and Coercion - Judicial Review - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court	
ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA, SAMUEL OFOSU ANSAH AND OLRB	230
Membership Evidence - Certification - Evidence - Practice and Procedure - Evidence before Board disclosing that individual whose name appeared as "witness" on union's membership evidence did not actually see employees sign their cards - Board dismissing union's motion that it not inquire further into matter as raising no prima facie case of misconduct or irregularity - Board, however, not agreeing that evidence before it making out prima facie case warranting inquiry into Form A-4 filed by union	
JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES	134
Natural Justice - Certification - Charges - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations	

that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA,
SAMUEL OFOSU ANSAH AND OLRB 230

Parties - Construction Industry - Construction Industry Grievance - Damages - Jurisdictional Dispute - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in *Sayers & Associates* and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed

ROBERTSON YATES CORPORTATION LIMITED; RE CJA, LOCAL UNION 785;
RE LIUNA 158

Petition - Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Termination - Timeliness - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed

SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW,
LOCAL 175 166

Practice and Procedure - Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Termination - Timeliness - Petition - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed

SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW,
LOCAL 175 166

Practice and Procedure - Certification - Charges - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA,
SAMUEL OFOSU ANSAH AND OLRB 230

Practice and Procedure - Certification - Evidence - Membership Evidence - Evidence before Board disclosing that individual whose name appeared as "witness" on union's membership evidence did not actually see employees sign their cards - Board dismissing union's motion that it not inquire further into matter as raising no prima facie case of misconduct or irregu-

<p>larity - Board, however, not agreeing that evidence before it making out prima facie case warranting inquiry into Form A-4 filed by union</p> <p>JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES</p>	134
<p>Practice and Procedure - Construction Industry - Construction Industry Grievance - Sale of a Business - Related Employer - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in <i>Goodman v. Rossi</i> and observing that there should be implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request</p> <p>D'LUXE DRYWALL (1987), 737049 ONTARIO LTD. O/A; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675</p>	112
<p>Ratification and Strike Vote - Strike - Employee complaining that contract ratification vote preceded by insufficient notice, and that undue pressure was applied to accept contract offer - Board dismissing application for failing to disclose prima facie case</p> <p>THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE DONNA GLOVER ET AL; RE UFCW, LOCALS 175 AND 633.....</p>	178
<p>Reconsideration - Certification - Constitutional Law - Employer's business including operation of mustard seed elevators - Employer seeking reconsideration of decision certifying union on ground that labour relations of employer falling in federal jurisdiction - Board not accepting argument that elevators operated by employer equivalent to elevators declared to be works for the general advantage of Canada under <i>Canada Grain Act</i> in that they perform similar function and should therefore also be found within federal jurisdiction - Board satisfied that employer's labour relations properly subject to provincial regulation - Reconsideration application dismissed</p> <p>G.S. DUNN & CO. LIMITED; RE TEAMSTERS LOCAL UNION NO. 879.....</p>	128
<p>Related Employer - Construction Industry - Construction Industry Grievance - Practice and Procedure - Sale of a Business - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in <i>Goodman v. Rossi</i> and observing that there should be implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request</p> <p>D'LUXE DRYWALL (1987), 737049 ONTARIO LTD. O/A; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675</p>	112
<p>Related Employer - Constitutional Law - Sale of a Business - Whether labour relations of applicant falling within federal or provincial jurisdiction - Applicant engaged in farm input and grain merchandising business - Board not persuaded that operation of grain elevators, silos, retail store and other operations at particular site sufficiently integrated into operation of feed mill and feed warehouse situated there so as to be to be subject to federal regulation - Work of employees at other sites not sufficiently integrated with operation of various federal works situated there to fall within federal jurisdiction - Board concluding that it has constitutional jurisdiction to hear merits of application</p> <p>LA CO-OPÉRATIVE DE POINTE-AUX-ROCHES, 1015195 ONTARIO LIMITED AND CHARLES DESMARAIS; RE UFCW, LOCAL 278W, AND CJA, LOCAL 3054; RE UNITED CO-OPERATIVE OF ONTARIO AND UCO PETROLEUM INC.; RE GROUP OF EMPLOYEES</p>	138
<p>Remedies - Bargaining Unit - Combination of Bargaining Units - Board in earlier decision directing combination of employer's "parts" and "manufacturing" bargaining units and remaining seized with respect to remedial issues - Employer and union subsequently asking Board to determine unresolved seniority integration issue under section 7(5) of the Act - Board</p>	

directing that seniority lists be “dovetailed” and that employees of both former “parts” and “manufacturing” bargaining units be credited with seniority from date of hire with the employer

FMG TIMBERJACK INC.; RE GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION 115

Remedies - Construction Industry - Construction Industry Grievance - Damages - Jurisdictional Dispute - Parties - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in *Sayers & Associates* and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed

ROBERTSON YATES CORPORTATION LIMITED; RE CJA, LOCAL UNION 785; RE LIUNA 158

Sale of a Business - Constitutional Law - Related Employer - Whether labour relations of applicant falling within federal or provincial jurisdiction - Applicant engaged in farm input and grain merchandising business - Board not persuaded that operation of grain elevators, silos, retail store and other operations at particular site sufficiently integrated into operation of feed mill and feed warehouse situated there so as to be to be subject to federal regulation - Work of employees at other sites not sufficiently integrated with operation of various federal works situated there to fall within federal jurisdiction - Board concluding that it has constitutional jurisdiction to hear merits of application

LA CO-OPÉRATIVE DE POINTE-AUX-ROCHES, 1015195 ONTARIO LIMITED AND CHARLES DESMARAIS; RE UFCW, LOCAL 278W, AND CJA, LOCAL 3054; RE UNITED CO-OPERATIVE OF ONTARIO AND UCO PETROLEUM INC.; RE GROUP OF EMPLOYEES 138

Sale of a Business - Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in *Goodman v. Rossi* and observing that there should be implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request

D'LUXE DRYWALL (1987), 737049 ONTARIO LTD. O/A; RE DRYWALL ACOUSTIC LATHING AND INSULATION LOCAL 675 112

Sale of a Business - Union alleging “sale of a business” where municipality cancelling its contract with transit company and “taking back” operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - *Labour Relations Act* amendments providing in section 64.2 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.2 of the Act having no application - Respondents also denying that transaction amounting to “sale of a business” - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and

after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business	
CHARTERWAYS TRANSPORTATION LIMITED, THE CORPORATION OF THE TOWN OF AJAX; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222	95
Security Guards - Bargaining Unit - Certification - Board finding that bargaining unit consisting solely of casino's surveillance staff constituting appropriate bargaining unit	
WINDSOR CASINO LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA)	206
Strike - Ratification and Strike Vote - Employee complaining that contract ratification vote preceded by insufficient notice, and that undue pressure was applied to accept contract offer - Board dismissing application for failing to disclose prima facie case	
THE GREAT ATLANTIC AND PACIFIC COMPANY OF CANADA LIMITED; RE DONNA GLOVER ET AL; RE UFCW, LOCALS 175 AND 633.....	178
Termination - Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Timeliness - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed	
SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW, LOCAL 175	166
Timeliness - Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Termination - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed	
SUEDON FOODS LTD. C.O.B. AS ELIZABETH STREET I.G.A.; RE UFCW, LOCAL 175	166
Unfair Labour Practice - Discharge - Just Cause - Board finding that employer had just cause for discharging employee accused of breaching company ticketing and receipting procedures - Application dismissed	
UNIT PARK; RE LIUNA, LOCAL 183	190

3583-92-R; 3584-92-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 222, Applicant v. **Charterways Transportation Limited**, The Corporation of the Town of Ajax, Responding Parties

Sale of a Business - Union alleging "sale of a business" where municipality cancelling its contract with transit company and "taking back" operation of municipality's transit system - Transit company found in earlier Board decision to be federal undertaking - *Labour Relations Act* amendments providing in section 64.2 that successor rights provisions applying to federal-to-provincial sales, but amendments coming into force only on January 1, 1993 - Respondents asserting that transaction occurred on December 31, 1992 and that section 64.2 of the Act having no application - Respondents also denying that transaction amounting to "sale of a business" - Board satisfied that by acquiring substantial part of work force previously employed by transit company, municipality transferring to itself an essential element of that business - Board concluding that municipality's hiring of employees on and after January 1, 1993 triggering sale and that section 64.1 of the Act applying to the transaction - Board finding and declaring sale of a business

BEFORE: *Roman Stoykewych, Vice-Chair and Board Members G. O. Shamanski and B. L. Armstrong.*

APPEARANCES: *L. N. Gottheil, Gord Vickers, Simon Threlkeld and Susan Collins for CAW Local 222; L. Steinberg, B. Quistgaard and Paul Middleton for London and District Service Workers' Union, Local 220; Thomas A. Stefanik, Bill Heslop and Don Dewar for Charterways Transportation Limited; Richard J. Charney, Rick Parisotto and Terry Barnett for The Corporation of the Town of Ajax.*

[**EDITOR'S NOTE:** Subsequent to the publication of the majority decision in this case at [1994] OLRB Rep. Oct. 1296, the following decision of Board Member Shamanski was released on February 22, 1995.]

DECISION OF BOARD MEMBER G. O. SHAMANSKI; February 22, 1995

1. Having spent considerable time and effort perusing and trying to digest the majority decision in respect to the case at hand, I must dissent.
2. I don't have any quarrel with the facts as stated in the decision. I do however take umbrage with the slanted interpretation of the facts and the decision that flowed from this interpretation for the following reasons.
3. Paragraph 6 clearly stated and rightly so that the newly proclaimed provisions of section 64.1 (1) of the *Labour Relations Act* came into effect as of *January 1, 1993* and has no application prior to this date.
4. Paragraph 7 makes it quite clear that Charterways provided and co-ordinated a complement of trained drivers to operate the buses, and a group of mechanics and cleaners to maintain and repair the fleet. They also provided spare parts and fuel for the operation of the buses. This business arrangement provided that Charterways would be compensated as set out in the contract.
5. Paragraph 17 amplifies that Charterways exercised its entrepreneurial initiative and expertise with respect to operating the transit system for the town of Ajax.

6. In Paragraph 19, it should be noted that in early 1992 the town voiced its dissatisfaction over the implementation of rate increases set out in the contract, more particularly upon Charterways refusal to voluntarily forego these increases in the ensuing discussion.
7. The town council voted on *July 20, 1992* to terminate the contract with Charterways as of *December 31, 1992* and to operate the system. In *August of 1992* employees of Charterways got notice that their employment would not be continued beyond the contract date.
8. It would appear obvious from the town's actions in this respect that they had no intention of renewing Charterways contract with the township.
9. I would like to turn now to the Board's dealing with the towns compassionate approach to hiring people who would be instrumental in operating the transit line once the town took it over.
10. The appropriate personnel within the township interviewed and hired a good number of Charterways people who had operated the busses when Charterways had the contract. I don't see anything wrong with the township's deliberations in this respect. It seems to me that had they not hired these people there would have been an anti-union animus charge hurled at them and I suggest this Board would have supported a finding of just that.
11. It seems to me that an employer is damned if he does and damned if he don't when appearing before this Board in respect to defending itself under the provisions of Bill 40 of the Act.
12. In conclusion, I would have ruled that the town's hiring of certain employees of Charterways was a humanitarian act and did not constitute a transfer of an essential element of that business.
13. I am satisfied that section 64.1 (1) had no role to play in this transaction as it took place prior to *January 1, 1993*. I would therefore dismiss the union's application.
-

2357-94-R United Food and Commercial Workers International Union, Local 175, Applicant v. Sports Experts Inc. c.o.b. Mega Collegiate Sports Experts and Collegiate Sports Experts, Responding Party

Bargaining Unit - Certification - Employer operating 6 retail stores in Metropolitan Toronto - Union applying to represent employees at single location - Employer asserting that only municipality-wide unit appropriate, and that single store unit would create serious labour relations problems because of employer's reliance upon frequent and regular flow of employees from one store to another in order to meet customer requirements - Board finding union's proposed bargaining unit appropriate - Interim certificate issuing

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

APPEARANCES: *Kelvin Kucey* and *Mike Duden* for the applicant; *Michael G. Sherrard* and *Steve Bonyhadi* for the responding party.

DECISION OF THE BOARD; February 8, 1995

1. This is an application for certification. There are two issues in dispute between the parties. The first is the appropriate bargaining unit. The applicant ("the union") has applied to represent employees in the following unit:

all employees of Sports Experts Inc. c.o.b. Collegiate Sports Experts at the *Eaton Centre*, 218 *Yonge Street*, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.

Clarity Note: "supervisor" as used herein shall include head cashier, *General Department Manager* and *Footwear Department Manager*.

2. The responding party ("Collegiate") takes the position that the unit requested by the applicant is not appropriate for collective bargaining purposes and proposes the following bargaining unit:

all employees of Sports Experts Inc. c.o.b. *Mega Collegiate Sports Experts* and Collegiate Sports Experts in the Municipality of Metropolitan Toronto, save and except supervisors, and persons above the rank of supervisor.

Clarity Note: "supervisor" as used herein shall include head cashiers, department managers and *third key holders*.

3. As can be seen from the proposed bargaining unit descriptions, the parties also disagree as to whether or not employees occupying certain named positions exercise managerial functions within the meaning of section 1(3) of the Act. As the applicant's right to certification in the unit it has requested cannot be affected, however, by the Board's ultimate decision as to the inclusion or exclusion of the disputed classifications, this dispute was not considered at the hearing in this matter. Instead, if the Board determines that the applicant's unit is an appropriate one, an interim certificate will issue and a Labour Relations Officer will be appointed to enquire into and report to the Board concerning the duties and responsibilities of the persons within the disputed classifications.

4. The facts concerning this matter were not largely in dispute. Collegiate operates six retail stores in the Municipality of Metropolitan Toronto, all of which are in the business of selling sporting goods. One of these stores is located at the Eaton Centre, and is the subject of the present application. There are 34 employees, including 18 full-time and 16 part-time employees, who fall within the applicant's proposed unit.

5. Employees at all of these stores exercise the same skills and perform the same kind of work under the same terms and conditions of employment. There is a uniform payroll system, insurance program and benefits plan. The six stores are a single establishment for pay equity purposes, and Collegiate has a single firm number with the Ontario Workers' Compensation Board.

6. Each store has a manager, who has the authority to hire and fire employees who fall within the applicant's proposed bargaining unit. District Supervisors are responsible for supervising Store Managers, and they in turn report to the Director of Operations.

7. Advertising for the stores is handled nationally with ads frequently tailored for the particular requirements of the Toronto area stores.

8. Two types of training are provided to employees at these stores: in-store training on specific products, which is delivered by suppliers, and off-site training conducted by employee coaches from Collegiate. This latter training covers salesmanship and product knowledge in general product areas, such as shoes or skates. It has been done off-site rather than in specific stores

for approximately two years. Employees from a variety of stores attend these sessions to ensure consistency in their knowledge and techniques.

9. Some employees from the applicant's proposed bargaining unit are part of buying teams organized by product, which attend at product shows and purchase stock for all of the stores. The managers, assistant managers and salespersons who make up these teams are drawn from a cross-section of stores.

10. Interchange of employees between the stores in the Toronto area occurs in one of two ways: on a temporary basis to replace regular staff who are unavailable or to provide additional staff during busy periods; or by way of permanent employee transfers, either laterally or as a promotion.

11. Temporary reassignments occur when a manager needs additional personnel to meet customer service requirements. A manager in need of assistance will contact other stores by telephone or electronic mail to see if employees there, usually part-timers, wish to work additional shifts. (There are numerous part-time employees working at the six Toronto Area stores. Part-time employees are defined by Collegiate as those working less than 32 hours per week.) Employees who choose to work these shifts do not appear on the regular schedule posted at the receiving store at the beginning of the week. The store at which the work is performed pays the salary and benefits of that employee for the shifts worked, but the employee will receive only one paycheque in each pay period, covering shifts worked at both the home and the receiving store. For purposes such as vacation entitlement, the employer considers the total number of hours worked by employees at any of the Collegiate stores. The filling of these shifts at other stores is voluntary in the sense that employees are asked if they wish to work them, and the employer does not suggest or infer to any employees that there will be discipline if they do not accept. Indeed, employees sometimes solicit shifts at other stores on their own initiative, as there is word-of-mouth about which stores are busy.

12. The employer provided a summary of temporary reassignments at the six Toronto area stores for the previous year, along with timesheets to corroborate this information. These records indicate that none of the Eaton Centre store staff worked shifts at any of the other stores during that period, but that twelve different employees from other stores accepted work at the Eaton Centre store, on thirty-two different occasions in 19 of 26 pay periods. The length of these assignments varied from under two hours worked in a two week pay period, to one full-time salesperson who worked more than 60 hours in a pay period.

13. A few examples of these reassignments, drawn from the information provided by the employer, demonstrate a certain pattern in the usage of temporary employees. The first employee on the list of transfers into the Eaton Centre Store was Michelle Babiarz, a part-time employee who regularly works at the store at the Fairview Mall in North York. During the first week of a two week pay period in October, 1993, she worked 30.04 hours at the Fairview Mall store and 3.23 additional hours at the Eaton Centre Store on a day when she got no hours at her home store. In the second week of that period she worked 26.29 hours at the Fairview Mall store and no hours elsewhere. A number of the part-time employees who accepted shifts at the Eaton Centre store during the previous year similarly appear to have been supplementing their regular part-time hours at their home store.

14. Another example demonstrates a variation of this pattern. Suzanne Lilly, a part-time employee from the store at Woodside Square in Scarborough, accepted from two to four shifts per week at the Eaton Centre store each week in January and February, 1994, working from 7 to 32 hours each week. During this same period, she worked no shifts at the Woodside Square store. Several other part-time employees who obtained shifts at the Eaton Centre store during the previ-

ous year worked either no, or very few, shifts at their home store during the same period. The two employees who worked no hours at their home store, including Suzanne Lilly, transferred permanently to the Eaton Centre store at the conclusion of their temporary assignments.

15. There is one final example which seems to be a departure from the regular usage of part-time employees. Sam Bruno is now a "third key man" at the Fairview Mall store. In October and November, 1993, when he was a full-time salesperson, he was asked if he would go to the Eaton Centre store to help them catch up with customer and supplier returns. In the first two week pay period of this reassignment, he worked 43.12 hours the first week at the Fairview Mall store, and then 44.00 hours the second week at the Eaton Centre store. During the following two weeks, he worked 41.43 hours the first week, and then only 19.31 the next, both at the Eaton Centre store, for a total of 61.14 hours (the most hours worked in one pay period on a temporary reassignment to this store). The reduction of hours in the last week of his assignment appears to have occurred because Bruno was ill. Bruno worked one further week at the Eaton Centre Store in early December, for 32.12 hours.

16. A review of the information provided on temporary reassignments at the other Toronto area stores demonstrates a similar pattern. However, none of the other stores had employees transfer in to work shifts as frequently as the Eaton Centre store, and all of the other stores also had employees transfer out, often to the Eaton Centre store.

17. Periodically employees transfer permanently from one store to another. There were seventeen such transfers of employees in positions below that of Manager between the six Toronto area stores in the year prior to the hearing. Two of these transfers were of part-time staff to the Eaton Centre store as noted in paragraph 14 above. One further employee who had previously worked at two of the Collegiate stores was re-hired at the Eaton Centre store. No employees from the Eaton Centre store transferred to another location.

18. Finally, it was not disputed that merchandise moves between stores depending on customer demand. If a particular store does not have an item in stock, sales staff may contact another store to arrange an interstore transfer or the customer may travel to the other store to pick it up.

19. Collegiate argues that these facts, and particularly those concerning the interchange of employees between stores, demonstrate that a single store bargaining unit would be inappropriate for collective bargaining purposes. Rather, Collegiate proposes a unit including all of the six stores in Metropolitan Toronto.

20. Counsel for the employer acknowledged that the Board's approach in determining whether or not a proposed unit is appropriate is that set out in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266: "does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer". The Board has commented on this approach more recently in *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85 at paragraphs 19 and 20:

...

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) "serious labour relations problems". A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

21. Collegiate submits that in this case a single store unit would create serious labour relations problems because of the employer's reliance upon the regular and frequent flow of employees from one store to another in order to meet customer service requirements. If bargaining unit employees in one store were represented by a trade union, Collegiate argues that this flow would be impeded, as employees would be prevented from transferring in or out of that store. The employer also suggests that this history of regular movement would create difficulties in determining what constitutes bargaining unit work in the event of a strike or lockout, as in its submission work is presently done with no distinction as to what location an employee regularly works at.

22. The employer's argument concerning the impact of a single store unit on the interchange of employees is premised in large part on the presumption that temporary transfers would be prevented by the unionization of the Eaton Centre store. It is not clear to the Board, however, that this would indeed be the outcome of granting a single store unit. It is true that the employer would have to negotiate with the union over the status, pay and seniority of temporary employees, rather than being able to determine these conditions of employment unilaterally, but this cannot be considered a serious labour relations problem given that a requirement to bargain is the inevitable outcome of unionization. And there would be nothing to stop the employer from continuing to include hours worked at the Eaton Centre store in its calculation of the service of employees not regularly employed in the bargaining unit.

23. The employer has further submitted that the frequency and regularity of these temporary transfers would make it difficult to determine what was bargaining unit work. Having due regard to the evidence submitted, largely by the employer, we cannot accept the assertion of counsel that the assignment of work has no regard to the location at which an employee regularly works. It was conceded that a regular schedule is made up in advance, which does not include temporary employee assignments. It is only when the store needs cannot be met through the scheduling of employees normally working at the Eaton Centre that others are called in. Time records confirm that a clear separation is maintained between hours worked at the home store and at the location of the temporary assignment, despite the issuance of a single cheque. And the personnel records maintained when a permanent transfer is carried out emphasize the sense that each and every employee is considered to be assigned to one home store, no matter how many hours are worked elsewhere.

24. The voluntary nature of these assignments also supports the conclusion that the make-up of the regular workforce at any particular location can be easily determined. While the movement of employees, at least to the Eaton Centre store, may be considered to be frequent and regular, these temporary transfers do not arise from the employer routinely reassigning employees from one location to another in order to meet customer demand; rather, the employer has been able to deal with increased work at specific locations by maintaining a large part-time workforce and offering them additional hours wherever and whenever the need arises. Thus, this is not a situation like that in *Tilden Car Rental Inc.* (Board File No.396-93-R, decision dated May 16, 1994), where the Board found that employees were expected to fill in at other locations as needed during their regular work week, and to move cars from location to location, as part of a centralized scheduling system covering all the locations in the Toronto area.

25. The employer seemed particularly concerned that these transfers would lead to disputes over bargaining unit work in the event of a strike or lockout. Practically speaking, this concern appears to have little substance, considering the ability of the employer to identify employees in the bargaining unit in the context of the present application, and also the historical data on the usage of temporary employees which they generated from regular time records. We are confident that any dispute over the work performed on temporary assignments which might arise in the future could be resolved through a similar approach, and that in any event the prospect of such a dispute is not so daunting as to constitute a serious labour relations problem.

26. The final aspect of the employer's argument concerning interchange arises from the practice of permitting permanent transfers from one store to another, either laterally or by way of promotion. The creation of a single store unit at the Eaton Centre does raise the spectre of a seniority enclave at that location, as employees would not automatically be able to carry their seniority at other locations into the bargaining unit, despite the employer's practice of calculating seniority based on service at all locations. Instead, the seniority of Collegiate employees transferring permanently into the bargaining unit would be a matter for negotiation between the employer and the union, which might result in either a confirmation of or a change in the employer's prior practice.

27. We are satisfied, however, that the prospect of bargaining over this issue does not raise the spectre of a serious labour relations problem in the circumstances of this case. At most, a bargained agreement not to permit employees to maintain seniority earned at other locations may act as a disincentive to permanent transfers. While this may be unfortunate, it was not asserted, and indeed the frequency of such transfers would not support, that this would be a serious impediment to the staffing of the Eaton Centre store. Equally, while such an outcome may be a disadvantage for employees who wish to make such a change, the evidence concerning these transfers does not support an argument that it is a common method of advancement; indeed, out of the 17 transfers referenced in paragraph 17 above, only three involved a promotion or increase in pay.

28. The employer relied upon the reasoning of the Board in the unreported decision of *Towne Cartage Ltd.* (Board File Nos. 2417-93-R, 2612-93-U, 2765-93-U, decision dated November 15, 1993) as support for its position in respect of interchange of employees. In that case, the Board concluded that the unit sought by the applicant, which would divide two related operations of a waste disposal company in Brockville and Prescott, was not appropriate, stating that:

Among other things, such a division has the potential to impede the mobility of employees between the locations (in case of work fluctuations, temporary or permanent transfers or advancement), to give rise to disputes in the event of a strike at one location, and to give rise to disputes over the transfer of work between the locations.

29. In that case, however, the Board found that the employer's operations at the two locations were functionally integrated to a significant degree. A review of the facts demonstrates clearly that there was much more integration than in the present case, having regard to the absence of management at one of the locations with the authority to hire, fire and transfer employees, the lack of a repair and maintenance crew or any office staff at one location, meaning that all billings, accounts receivable and accounts payable for both locations were done at one site, and a number of production and shipping functions which were fully integrated. Indeed, it appears that the evidence in that case concerning interchange of employees played only a minor role in the Board's conclusion that to divide the employees of the company between two locations for the purposes of collective bargaining had the potential to cause serious labour relations problems.

30. Similarly, there are important factual distinctions between this case and that of *MDS*

Health Group Limited, [1993] OLRB Rep. Sept. 849, where the interchange of employees was only one of many factors considered by the Board in determining that a single location unit was not appropriate. Other factors present in the MDS case included a large number of locations (26) in a relatively small geographic area, small numbers of employees at many of those sites, including 9 single employee locations, an absence of on-site management in many of the locations so that even work assignment often occurred from off-site, such extensive movement of work that the company employed 32 couriers, and significant division of functions between different locations. The Board also considered an earlier decision involving a competitor which had established an industry precedent for multiple-location certification.

31. The union cited several cases where interchange had been considered by the Board and found not to preclude the granting of a location specific unit. Of particular note is the decision in *Canadian Tire Petroleum*, [1994] OLRB Rep. April 360, which involved an application to certify one of two gas bar locations run by that company in Thunder Bay. Many of the facts in that case were similar to those agreed to here: the employees at the two locations had the same terms and conditions of employment and performed the same work; there was joint training of employees from both gas bars; advertising and the contracting for snowplowing and provision of flags were done centrally; and, non-gasoline products were routinely moved from one location to another in case of a shortage. In addition, there was further evidence of integration between the two facilities: there was only one manager in charge of both sites, who held joint staff meetings and social events.

32. The evidence of interchange of employees in *Canadian Tire Petroleum*, *supra*, established that when employees were hired by the manager they were assigned to one of the two gas bars, but were told that hours might be available at either location. Employees maintained time cards at their home location, and separate schedules were made up for each of the two locations. Employees would be contacted and offered hours at the other location, however, if the staff regularly assigned there were unable to cover all of the available shifts. The evidence disclosed four such temporary reassignments in the four month period prior to the application date, in a bargaining unit of eight employees, which is reasonably comparable in frequency to the evidence about Collegiate, taking into account the relative sizes of the two units.

33. After considering the argument of the responding party in *Canadian Tire Petroleum*, *supra*, that a single location unit would be inappropriate in light of these facts, the Board granted the unit requested, noting that the labour relations problems canvassed by the employer were "matters which can dealt with in collective bargaining and are in any event purely speculative". This decision is interesting given that the facts in that case suggest a greater degree of integration than has been established in the present case.

34. Collegiate also submits that the practice of conducting centralized training and having employees from various stores sit together on buying teams would pose serious labour relations problems for a single store unit. In particular, counsel for the employer argued that employee participation on these centralized teams would pose a further difficulty in defining bargaining unit work.

35. We cannot accept that these practices are likely to create serious labour relations problems in the event that the Eaton Centre store becomes unionized. The employer clearly has a legitimate interest in ensuring a standard level of competence and product knowledge amongst all its staff, but there is nothing about having some employees work in a unionized environment which should preclude that. Equally, the presence of a bargaining agent should not prevent the employer from involving employees from various stores in the buying process. We also fail to see how the

performance of training and buying functions by some employees will create confusion about the ambit of bargaining unit work.

36. In addition to its arguments about serious labour relations problems, Collegiate submits that the Board should prefer the larger unit even where two appropriate units have been proposed, rather than permitting fragmentation by granting the smaller unit simply because that is what the union has proposed. In support of this argument, the employer relies upon section 7 and the Board's interpretation of that section in recent cases, such as *Cineplex Odeon Corporation*, [1994] OLRB Rep. July 824 and *The Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042, where numbers of smaller single location units have been combined. The employer asserts that the Board should be expressing the preference for larger units which is clear from these decisions at the front end of the process, by taking the same approach in certification applications.

37. This argument ignores a point which has been made in virtually every Board decision considering an application for combination: that the considerations under section 7 are different from those in a certification application, in large part because we are not required to consider issues around impediments to organizing and employee choice (see for example the comments in *Cineplex Odeon Corporation*, *supra*, at paragraph 8). In the context of combination applications, therefore, the Board may more freely express its concern for fragmentation and its corresponding preference for larger units, without regard for the countervailing concern that not permitting the organization of small units might prevent employee access to collective bargaining.

38. As the Board noted in *Salvation Army*, *supra*, there is a general preference for more comprehensive units even at the point of certification, as discussed in paragraph 21 of that case:

• • •

21. If there is one theme that has been constant in the Board's concerns, both before and after *Hospital for Sick Children*, it is the aversion to fragmentation: the sub-division of an employer's enterprise into a number of separate collective bargaining components - which become separate seniority districts, which can lead to jurisdiction or inter-employee rivalries, which can generate organizational problems if one or other fragment goes on strike, which can make work-sharing or technological change more difficult to accommodate, and so on. Accordingly, while smaller sub-divisions may be appropriate in the context of a particular case, and may be necessary to facilitate organizing (despite the collective bargaining "downside" described above), a broader, more comprehensive unit will *also* generally be appropriate. In other words, if a trade union seeks a *more* comprehensive bargaining unit, this larger unit will usually be appropriate, and will very likely be accepted on the *Hospital for Sick Children* test, unless there are serious labour relations problems with it which *demonstrably* overwhelm the difficulties associated with fragmentation, or unless the larger unit applied for seems idiosyncratic or perverse. Indeed, unless the labour relations context is quite unusual, one would expect the more comprehensive bargaining unit to be presumptively appropriate, if that is what the union has organized and applied for; and it serves no purpose to engage in the exercise mentioned in the emphasized portion of the *Hospital for Sick Children* case reproduced at paragraph 18.

39. Where a union has not applied for the more comprehensive unit, however, and it is the employer who wishes to expand the scope of certification, the Board must consider carefully the test articulated in *Hospital for Sick Children*, *supra*, and in particular whether or not the unit applied for, which may not be the **most** comprehensive nor the **most** appropriate, will create serious labour relations problems for the employer. This is the approach discussed by the Board at paragraphs 19 and 20 in the *Salvation Army* decision, which are reproduced at paragraph 20 above, and is an approach which is necessary to ensure that our aversion to fragmentation does not create unreasonable impediments to employees' access to collective bargaining.

40. Counsel for the employer argued that the introduction of the combination power into

the Act ought to reduce the Board's concern about reducing impediments to organizing, even at the level of certification, as it demonstrates a clear preference for larger bargaining units. Instead, it seems clear that the creation of the power to combine units demonstrates a recognition on the part of the Legislature that the concern to ensure employee access to collective bargaining will inevitably create some fragmentation, which until Bill 40 could not be remedied by the Board if a union was later more successful in organizing within the larger potential unit. This pattern seems clear in the combination decisions cited by the employer, and is certainly not inconsistent with the granting of a single location unit in the present case.

41. To summarize our conclusions in this matter, we have determined that the operations of the employer at the six stores in Metropolitan Toronto are not integrated to any significant degree, and that the interchange of employees between locations, while it may be considered to be frequent and regular, is not of such a nature that it would create any serious labour relations problems. For these reasons, we are satisfied that the single location unit proposed by the applicant is a unit of employees which is appropriate for collective bargaining purposes.

42. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

43. As noted in paragraph 3 above, there is an outstanding dispute between the parties as to the composition of the bargaining unit. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the disputed classifications. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit on October 4, 1994, the certification application date, had applied to become members of the applicant on or before that date.

44. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, having regard to the agreement of the parties and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for,

all employees of Sports Experts Inc. c.o.b. Collegiate Sports Experts at the Eaton Centre, 218 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor.

Clarity note: "supervisor" as used herein shall include, pending the resolution of the status of these categories, head cashiers, department managers and third key holders.

45. A Labour Relations Officer is hereby appointed to inquire into and report to the Board concerning the duties and responsibilities of the persons within the disputed classifications.

46. A final certificate must await the final determination of the appropriate bargaining unit.

CONCURRING OPINION OF BOARD MEMBER J. A. RUNDLE; February 8, 1995

1. Given the current state of the Board's jurisprudence in cases such as the present one, I must concur with the majority decision.

2. While my concurrence is based on the current state of the law, I still agree with the labour relations concerns expressed by my colleague Mr. Correll in *Canadian Tire Petroleum*, [1994] OLRB Rep. Apr. 360, which flow from such a result as the present case.

2825-94-U Ivan Cvcek, Applicant v. Schneider Employees Association, Responding Party v. J.M. Schneider Inc., Intervenor

Discharge - Duty of Fair Representation - Union's decision not to proceed to arbitration with complainant's discharge grievance violating Act in light of critical job interests at stake, apparent merits of grievance, union's failure to investigate complainant's story or to allow him to participate in meeting of executive and steward body, and in light of union's failure to explain its decision to the Board - Complaint allowed - Union directed to refer grievance to arbitration and employer directed to waive timelines objection

BEFORE: *Laura Trachuk*, Vice-Chair.

APPEARANCES: *T. J. Billo* and *Ivan Cvcek* for the applicant; *Edward Babin*, *Charles Losier* and *Don Flynn* for the responding party; *Michael Kennedy* and *Steve Caron* for the intervenor.

DECISION OF THE BOARD; February 9, 1995

1. This is an application under section 91 of the *Labour Relations Act* alleging that the Schneider Employees Association (sometimes referred to in this decision as "the union") violated section 69.

2. The applicant alleges that the union acted arbitrarily in investigating the circumstances surrounding his discharge and in determining not to proceed to arbitration with his grievance.

3. Section 69 of the *Labour Relations Act* provides as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

4. The Board finds that the responding party did act arbitrarily in its representation of the applicant, thereby violating section 69 of the Act.

The Facts

5. There is little dispute about the relevant facts in this matter. Mr. Cvcek has worked continuously for the intervenor (sometimes referred to in this decision as "the company") since 1977. He is 53 years old and has four children. Mr. Cvcek was born in the former Yugoslavia and still has family there, including his mother. He is trained as a meat cutter and the company is a meat processing operation.

6. In 1988 Mr. Cvcek sustained an injury to his elbow in the workplace and has been on workers' compensation or modified work since that time.

7. On April 4, 1994 Mr. Cvcek was working washing out the vats with another employee, Dennis Lesperance. Mr. Lesperance, who is also a union steward, sprayed Mr. Cvcek with a power hose causing his pants to become wet and dirty with meat and fat. Mr. Cvcek told Mr. Lesperance that if he sprayed him again he would make him eat the contents of a bucket. Mr. Cvcek testified that he heard Mr. Lesperance say to another employee named John "I got him good that time." Mr. Cvcek understood Mr. Lesperance to be referring to himself.

8. Mr. Lesperance then complained to a foreman that Mr. Cvcek had threatened him. Mr. Cvcek also went in search of the foreman to complain about Mr. Lesperance's actions, but Mr. Lesperance spoke to him first.

9. The next day Mr. Cvcek was advised that he must attend a meeting with management before starting work. He waited for several hours in the cafeteria for this meeting to take place. The president of the union, Charles Losier, attended on behalf of the applicant as did two other members of the union's executive. No one met with Mr. Cvcek before the meeting.

10. At the meeting the company advised Mr. Cvcek that he was being terminated for the incident on April 4. Mr. Cvcek was told that the company was "taking Dennis' story" over his. The company had met with Mr. Lesperance that morning with a different union representative present. No notes were available with respect to that meeting and no one testified with respect to what occurred there. Mr. Cvcek told the company and the union about Mr. Lesperance's comment to John.

11. After the meeting with Mr. Cvcek, Mr. Losier asked Mr. Lesperance if he had made the statement to John. Mr. Lesperance denied having spoken to John about Mr. Cvcek. It was somewhat unclear in Mr. Losier's evidence whether or not Mr. Lesperance denied having made the statement to John at all or whether he was only denying that they had been talking about Mr. Cvcek. Mr. Losier then asked Mr. Lesperance to check with both employees named "John" who worked in that area whether or not the statement had been made by himself about Mr. Cvcek. Mr. Lesperance reported back to Mr. Losier that both "Johns" agreed that he had not spoken to them about Mr. Cvcek. Mr. Lesperance did not testify.

12. Mr. Cvcek filed a grievance which went directly to the Step 3 grievance meeting as specified in the collective agreement. There was some dispute as to whether Mr. Cvcek attended that meeting, but the Board finds that he did. The company denied the grievance.

13. The union subsequently contacted both the Workers Compensation Board and the Human Rights Commission to determine whether or not Mr. Cvcek might have a complaint within their jurisdictions and was advised that he would not. However, during the summer of 1994 the union did represent Mr. Cvcek at a workers' compensation appeal unrelated to his discharge.

14. At the monthly meeting of the local executive and stewards on June 13, 1994, the issue of whether or not to proceed to arbitration with Mr. Cvcek's grievance was raised. This monthly meeting is attended by all of the union's local officers and stewards in Ontario, some 40 people.

15. As Mr. Lesperance is a steward, he attended the meeting and took the opportunity to present his version of the April 4 events. Mr. Cvcek asked to attend the meeting and was refused. The union's explanation for refusing to allow him to attend was that the collective agreement prohibits discharged employees from being on the company's premises, except for grievance meetings. The meeting was being held, as always, on the company's premises. Mr. Losier agreed that there is no requirement that these meetings be held on the company's premises and that there is at least one hotel within a mile of the workplace where a meeting could be held. However, he noted that if a meeting were held off the premises, the employees would be away from work longer and the union would have to get the company's approval. In this case, the company was neither asked whether employees could attend a meeting off the premises nor whether Mr. Cvcek could attend a meeting on the premises. The Manager of Employee Relations, Steve Caron, testified that he would have refused to allow Mr. Cvcek on the premises to attend the meeting.

16. At the June 13 meeting, a number of employees mentioned incidents which Mr. Cvcek

had been rumoured to be involved in previously. However, Mr. Losier advised them that the only discipline in his file, and therefore the only thing that the company could rely upon besides the April 4 incident, was an incident in December, 1993 for which he had been suspended. The steward and executive body voted to proceed to arbitration.

17. As the union's lawyer was not available for an expedited arbitration, the union decided to retain Mr. Billo, Mr. Cvcek's lawyer, to present the grievance at arbitration. Mr. Billo asked Mr. Losier to meet with him to prepare for the arbitration, and to bring all relevant documents, including whatever was in the personnel file. Mr. Losier had reviewed Mr. Cvcek's file in April and only found reference to the December 1993 incident. However, when Mr. Losier reviewed the file in June to prepare for his meeting with Mr. Billo, he found a number of other disciplinary notations. He advised the members of the executive of what he had found and they decided that they needed to hold an emergency steward and executive meeting to revisit the issue.

18. The emergency meeting was held on June 17. At that meeting, Mr. Losier presented all of the discipline related documents in Mr. Cvcek's file on an overhead projector so that everyone could read them. Although the documentation revealed a record of one physical altercation, two threats and one swearing incident which all took place after 1987, the documentation that Mr. Losier actually showed the meeting was voluminous and consisted of the following:

- a) notice of a three-day suspension in 1987 for fighting;
- b) notice of a balance of shift plus one day suspension in June, 1991 for threatening and spitting on another employee;
- c) 6 pieces of correspondence from May and June 1992 relating to a single incident in which Mr. Cvcek swore at someone at the Health Centre. Some of these documents indicate that as a result of this incident the company was requiring Mr. Cvcek to see a counsellor to help him deal with his temper. At least one of the people at the June 17 meeting, namely the recording secretary, was under the mistaken impression that this documentation dealt with two separate incidents of swearing. In fact, Mr. Losier himself appeared to be under that impression until the union's counsel pointed out to him that that was not the case;
- d) 4 documents, including a doctor's report, relating to the incident in December 1993. These documents indicate that in December 1993 Mr. Cvcek advised someone at the counter in the Human Resource department who was helping him fill out a dental form, that someone in Calgary was holding five people hostage at the Workers' Compensation Board. He said something to the effect of: "Maybe I should do something like that here if that's what it takes to get something done". As a result of this incident, he was suspended for a month until he provided a doctor's report indicating that he could return to work. It was agreed that the period of time he was off would count as a suspension but that he would receive weekly indemnity benefits because the company was requiring him to see a doctor. The disciplinary letter states that "any further occurrences of inappropriate behaviour will result in immediate termination of employment";
- e) the termination letter dated April 6, 1994.

19. Mr. Cvcek was not permitted to attend the meeting of June 17. Mr. Lesperance again presented his version of the April 4 incident, but did not vote. Mr. Losier read a letter from Mr. Cvcek's counsel which outlined Mr. Cvcek's position and indicated that it was his legal opinion that Mr. Cvcek had a strong case for reinstatement. Mr. Losier gave a brief account of what he said was "Ivan's side of the story". He does not appear to have referred to Mr. Cvcek's claim that Mr. Lesperance had said to John "I got him good this time." Mr. Losier also advised the meeting that he was in favour of proceeding to arbitration and that it was the opinion of the union's regular counsel that the case was tough but winnable. Mr. Losier testified that he supported arbitrating the grievance because it was the union's information that Mr. Cvcek was on a list of disabled employees that the company planned to terminate. At this meeting the executive and steward body voted 19 to 16 with 2 abstaining, not to proceed to arbitration.

20. Mr. Losier contacted Mr. Cvcek and his lawyer and advised them of the decision not to proceed to arbitration. Mr. Billo then wrote another letter to the union protesting this decision and asking to attend the next meeting of the stewards to discuss the situation. This letter was read at the next meeting. In the letter, Mr. Billo complained that neither he nor Mr. Cvcek had attended the earlier meetings. The local executive and stewards decided not to reconsider the earlier decision.

21. Grievors in other matters have attended the steward and executive meetings to explain why their grievances should proceed to arbitration. In fact, an employee who had been suspended for horseplay and fighting attended the April, 1994 meeting. An employee who had been disciplined for an altercation with another employee attended the June meeting. The collective agreement says that employees who have been suspended or discharged are not allowed on the premises. However, once a suspended employee has returned to work, he or she can attend the steward's meeting. The result is that only discharged employees are prevented from attending these meetings to plead their cases for proceeding to arbitration.

22. In June, 1994 Mr. Cvcek asked Mr. Losier for the home addresses and telephone numbers of Mr. Lesperance and Mr. Caron. When Mr. Losier refused to provide the information, Mr. Cvcek advised that he might follow them home. Mr. Losier felt that he must disclose this information to the people involved and did so.

23. The union constitution indicates that the National Grievance Committee, consisting of the National President (Mr. Losier), the Local Officers and the Steward of the Division where the grievance arises (Mr. Lesperance) shall deal with a grievance if no settlement is reached after the last step of the grievance procedure. The constitution also says that no grievance may be taken to arbitration without the express approval of the National Officers. However, Mr. Losier testified that, as the National Officers and Local Grievance Committee participate in the executive and steward meeting and vote in that forum, the decision made by vote at that meeting determines whether a grievance will be taken to arbitration.

24. Mr. Losier has been president of both the local and the national union since 1988. He was vice-president from 1981 to 1988 and a steward from 1976 to 1981. He testified that he wrote the union's constitution. Mr. Lesperance had been a steward for 10 years and was therefore known to all of the other stewards. Mr. Losier testified that Mr. Lesperance knew some of the other stewards very well.

Decision

25. The Board has described arbitrary behaviour in a number of previous decisions. In *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, at paragraph 38, the Board stated:

38. With these thinking processes hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be “reasonable” (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Limited* [1980] OLRB Rep. July 1001, ¶20), “not unreasonable” (*Ivan Pleikos*, [1977] OLRB Rep. November 776, ¶13), “not open to challenge” (*Oil, Chemical & Automatic Workers International Union and its Local 9-698*, [1972] OLRB Rep. May 521, ¶3), or at least “not implausible” (*Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers “patent” and arrives at an “almost perverse” understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from “directing its mind to the real question”, and that in so doing it has acted in an arbitrary fashion; *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 523, ¶30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

In *Abdel Elejel*, [1985] OLRB Rep. June 841, the Board wrote:

44. In order to find arbitrariness, this Board would have to conclude that the Union failed to direct its mind to the merits of the complainant’s grievances or failed to enquire into or act upon available evidence or conduct any meaningful investigation to obtain the information to justify its decision. Alternatively, arbitrariness could be established if the complainant could show that the Union acted on the basis of irrelevant factors or principles or displayed an attitude that was indifferent, capricious or non-caring towards the complainant. (See *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001.)

And in *Raymond McLeod*, [1987] OLRB Rep. April 547, at paragraph 32, the Board stated:

32. The central issue which crystallized in this case is the extent of the union’s responsibility under section 68 [now 69] to investigate Mr. McLeod’s grievance. That section [69] imposes such a responsibility is well established in the Board’s jurisprudence (see, for example, *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, *Jeanne St. Pierre*, [1986] OLRB Rep. June 883, and *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215). To avoid the characterization of a decision as arbitrary, a union must, among other things, turn its mind to all the relevant facts in a case. It follows that the union must therefore make reasonable efforts to unearth the relevant facts so that they may be considered. Thus a union is required to enter into a process of collecting and evaluating information as a preliminary step to making a decision which is consistent with the duty of fair representation. As the Board noted in *Savage Shoes Ltd.*, *supra*:

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

26. The applicant conceded that the responding party did not act discriminatorily or in bad faith in its dealings with him. It was argued, however, that the union had acted arbitrarily in failing to adequately investigate the circumstances surrounding the termination and in refusing to permit

Mr. Cvcek to attend the executive and steward meeting. The union denied that it had acted arbitrarily and argued that Mr. Losier had demonstrated a caring attitude to Mr. Cvcek throughout.

27. It is apparent to the Board that Mr. Losier was personally concerned about Mr. Cvcek and was looking for some way to alleviate the hardship that the termination imposed upon him. That is why it is so surprising that he responded so cavalierly to information which suggested the possibility that Mr. Cvcek had been sprayed, or reasonably thought he had been sprayed, on purpose. It appears that neither Mr. Losier, nor anyone else involved in this matter on behalf of the union, ever really put his mind to the question of whether Mr. Cvcek's behaviour was sufficiently inappropriate to be worthy of discipline if Mr. Lesperance had indeed sprayed him with water, meat and fat on purpose. It is this failure to consider a significant aspect of Mr. Cvcek's case against termination which must have led to Mr. Losier's puzzling decision to send the very person who had made the complaint which led to the discharge to investigate the matter and contact the named witness. Such negligence can only be explained by either the fact that Mr. Losier did not seriously consider that such a witness would be relevant or that he purposely wished to sabotage Mr. Cvcek's defence to his termination. Given Mr. Losier's apparent support for arbitrating Mr. Cvcek's grievance, the Board prefers the former explanation. Mr. Losier's actions were certainly not attributable to any inexperience on his part as he had been participating in the grievance process for 18 years.

28. The union's assumption that the circumstances in which Mr. Cvcek made the "threat" are not relevant to the discharge grievance would also explain why it permitted Mr. Lesperance to attend the meeting in which the decision of whether or not to go to arbitration was being made and to tell his side of the story without making it possible for Mr. Cvcek to do the same. The "story" being told by Mr. Lesperance is one in which he is either an innocent victim or a provocateur possibly worthy of discipline himself. The attendees at the meeting would be deciding whether to send the grievance to arbitration at least partly based on whether they thought Mr. Cvcek deserved his termination. It was therefore crucial that they receive a balanced account of events. Mr. Losier supposedly reported Mr. Cvcek's side of the story, but given his indifference to the possibility that Mr. Cvcek might have been provoked on purpose or might reasonably have thought he was, gives the Board no confidence that whatever story he told truly represented Mr. Cvcek's point of view. Mr. Lesperance should have either declared his conflict of interest and absented himself from the meeting, or arrangements should have been made to hold the meeting off the company's premises so that Mr. Cvcek could attend.

29. The Board has previously considered the impact of the participation of someone who has a personal interest in the outcome in the decision of whether to go to arbitration. In *C.U.P.E. Local 67* (October 1993, unreported) the Board found that the participation of persons on the grievance committee who could be affected by the outcome of a number of "bumping" grievances was not a violation of the Act because the evidence established that the grievances in question were treated the same as those in which no potential conflict existed. In these circumstances, however, the participation of Mr. Lesperance in the discussion of whether to proceed to an arbitration in which he might, as a finding of fact, be found at fault may very well have affected the outcome. His side of the story may have influenced the three people who made the difference on April 17. Had he not participated in the meeting, or had Mr. Cvcek been allowed equal time, the committee may well have decided to go to arbitration. The union suggested that the Board find that the participation of Mr. Lesperance had no effect on the committee's decision because it had voted to proceed to arbitration at the meeting of June 13 even though he attended. The Board disagrees. At least some members of the committee may have decided to vote not to go to arbitration on June 17 on the grounds that Mr. Cvcek deserved to be terminated because of Mr. Lesperance's version of the April 4 events.

30. It appears to the Board that Mr. Cvcek had at least a reasonable chance of being reinstated through arbitration. In circumstances such as these, where critical job interests are involved, the Board expects the union to provide a satisfactory explanation as to why it chose not to send the grievance to arbitration. (See *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920.) In this case, the Board received no such explanation. Mr. Losier, the union's only witness, testified that he did support taking the grievance to arbitration. He offered no explanation as to why, therefore, the union did not follow that course. The union appeared to consider it sufficient that the decision had been made by a vote of the executive and steward committee.

31. Although the union constitution designates a grievance committee, in practice the decision of whether to send a grievance to arbitration is determined by a majority vote of the executive and steward body. However, the fact that such a decision was made by way of a vote is not an answer to a claim of arbitrariness. A group is as capable of acting arbitrarily as an individual. The union is still required to present the Board with an explanation as to why it decided not to proceed to arbitration. In the absence of such an explanation, and in light of the apparent merits of Mr. Cvcek's grievance, the union's failure to investigate his story or to allow him to participate in the meeting leads the Board to the conclusion that it acted arbitrarily.

32. The applicant has requested that this matter be referred to arbitration and that the applicant's counsel be used in the hearing. As the Board has found that the union acted arbitrarily in deciding not to send this grievance to arbitration, the appropriate remedy is to direct that it do so. However, the Board's practice in these cases is to direct that the applicant and the union agree to counsel to present the grievance at arbitration, and the Board considers that to be the appropriate remedy in this situation as well. The company will be directed to waive any preliminary objections to a hearing on the merits with respect to timeliness.

33. For the foregoing reasons, the Board hereby makes the following orders:

- 1) that the responding party union forthwith refer the applicant's grievance to arbitration either by the expedited procedure under the *Labour Relations Act* or, if the applicant agrees, by way of the arbitration provisions of the collective agreement;
- 2) if the grievance is not settled prior to a hearing on the merits, that the company waive any preliminary objections with respect to timeliness;
- 3) that the union and the applicant agree to a representative to present the grievance at the arbitration hearing.

34. The Board will remain seized of this complaint for the purpose of entertaining the representations of the parties with respect to the amount of compensation which is to be borne by the union in the event that an arbitration award provides for compensation to be paid to the complainant. The Board also remains seized of this complaint for the purpose of resolving any matter arising out of the interpretation or implementation of the above order.

0759-94-G; 1108-94-G; 1109-94-G; 1110-94-R Drywall Acoustic Lathing and Insulation Local 675, Applicant v. 737049 Ontario Ltd. o/a **D'Luxe Drywall (1987)**, Responding Party; Drywall Acoustic Lathing and Insulation Local 675, Applicant v. Battlefield Drywall Inc. and 737049 Ontario Ltd. c.o.b. as **D'Luxe Drywall (1987)**, Responding Parties.

Construction Industry - Construction Industry Grievance - Practice and Procedure - Sale of a Business - Related Employer - Union seeking pre-hearing production order - Board noting recent Divisional Court decision in *Goodman v. Rossi* and observing that there should be implied undertaking by a party to which documents are produced, although perhaps modified to suit its purpose - Responding employer given ten days to reply to union's request

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMenemy*.

DECISION OF THE BOARD; February 27, 1995

1. Board File Nos. 0759-94-G, 1108-94-G and 1109-94-G are referrals to the Board of grievances in the construction industry, under section 126 of the *Labour Relations Act*. Board File No. 1110-94-R is an application for relief under sections 1(4) (related or single employer) and 64 (sale of business or successor employer) of the Act. They appeared to be related.
2. The last of these applications was filed on June 29, 1994. It is not apparent what if anything has happened in any of them since mid-July 1994.
3. By letter dated February 23, 1995, the applicant trade union requests that the applications all be scheduled for hearing, and that the Board issue a pre-hearing production order. More specifically, the applicant seeks an order that the responding employers produce documents as follows:

A. ORDERS REQUESTED

1. An order that the Respondents produce by March 15, 1995, to the applicant and to the Board all documents pertaining to the corporate and business structure of D'Luxe and Battlefield. Without limiting the generality of the foregoing, all Corporate Minutes, By-Laws, Articles of Incorporation, Directors' Resolutions, Shareholder Resolutions, Shareholder Agreements, Directors' Registers, Shareholder Registers, Officers' Registers, Share Transfer Registers, Share Certificates, filings with the Minister of Consumer and Commercial Relations pursuant to the *Corporation Information Act*, and any other agreements or notes reflecting agreements between any of the Shareholders, Officers or Directors of the respondents.
2. An order that the Respondents produce by March 15, 1995, to the applicant and the Board all documents pertaining to any commercial transactions between D'Luxe and Battlefield. Without limiting the generality of the foregoing, all agreements, purchase orders, contracts, subcontracts, leases, securities and guarantees between the respondents and all agreements, contracts, subcontracts, leases and guarantees entered into jointly by the responding parties.
3. An order that the Respondents produce by March 15, 1995, any documents indicating a disposition by any mode whatsoever of the business assets, goods, receivables, leases, or equipment of D'Luxe and Battlefield.
4. An order that the Respondents produce by March 15, 1995, a list of the following:

- (a) premises owned, leased or occupies by each Respondent;
- (b) equipment owned, leased or used by each Respondent;
- (c) payroll records for the last five years by each Respondent;
- (d) a copy of all business cards issued by each Respondent;
- (e) name of accountant and bookkeeper for each Respondent;
- (f) name of solicitor for each Respondent;
- (g) customer list for each Respondent;
- (h) phone and fax numbers used by each Respondent;
- (i) all persons with authority to sign cheques on behalf of each Respondent;
- (j) all signs indicating associated existence; and
- (k) all shared office equipment and sales personnel.

5. An order that the Respondents provide by March 15, 1995, all documents they intend to rely on at the hearing.

4. Sections 1(4), 1(5), 64(1), 64(1).1, 64(2) and 64(13) provide that:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

64.(1) In this section,

“business” includes one or more parts of a business; (“entreprise”)

“predecessor employer” means an employer who sells his, her or its business; (“employeur précédent”)

“sells” includes leases, transfers and any other manner of disposition; (“vend”)

“successor employer” means an employer to whom the predecessor employer sells the business. (“employeur qui succède”)

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

• • •

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

5. Under the *Labour Relations Act*, the Board is empowered to determine its own practice and procedure, and make rules in that respect, and to make pre-hearing production orders (sections 104(13) and 13.1, and 105(2)(a.1). Rule 15 of the Board’s Rules of Procedure stipulates that each party to a Board proceeding must file with the Board and deliver to each other party copies of all documents upon which it intends to rely in the proceeding. Further, although neither the

Board's Rules, nor effective case management require the kind of elaborate pleadings, pre-hearing discovery, or disclosure typical in civil proceedings, applications under sections 1(4) and 64 of the Act are among those cases in which there is often significant benefit derived from pre-hearing disclosure.

6. Sections 1(4) and 64 of the *Labour Relations Act* deal with the labour relations consequences or ramifications of business relationships or transactions. Both provisions operate to modify common-law notions of separation between corporate or other economic entities, and privity of contract. Pre-hearing disclosure is often particularly helpful in such cases because they often turn on an assessment of commercial facts which are not substantially in dispute. Accordingly, detailed pleadings and pre-hearing disclosure enable the parties to identify and join issue on the factual legal issues between them, and allows that parties to assess their respective positions. It also tends to make estimates of the hearing time which will be required to deal with an application more reliable and allows for more effective case management by both the Board and the parties.

7. In this case, the responses filed by the responding employer is rather sparse. Neither the responding employer appears to have filed any documents.

8. It appears that many of the documents which the applicant seeks to have produced are typically produced and relevant in such proceedings. However, part of the applicant's request appears to require that the responding employers create as well as produce documents. While the information which would be revealed in that respect may well be relevant to a proper consideration of the application under sections 1(4) and 64, any obligation to produce documents, whether arising out of a Board order or otherwise, does not include an obligation to create documents which do not exist (although it may well be helpful if the information itself is provided).

9. We note that in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659, the Board considered the effect of the issuance and enforcement over summons *duces tecum* and the protection to a party which produce documents in response thereto. In that latter respect, the Board concluded that there is an implied undertaking by a party to which documents are produced in a Board proceeding that such documents will not be used for any collateral or ulterior purpose; that is, for a purpose unrelated to the proceeding in which the documents are produced. In arriving at that conclusion, the Board in *Shaw-Almex Limited*, *supra*, applied the English law on the issue.

10. Recently, in *Goodman and Rossi*, (1995) 25 O.R. (3d) 112 (Application for Leave to Appeal to the Court of Appeal for Ontario filed December 9, 1994), the Ontario Court (General Division), Divisional Court held that the law of Ontario does not impose an implied undertaking by a party to which information or documents are provided in an examination for discovery or through production of documents that it will not use that information for any collateral or ulterior purpose. In doing so, the Board specifically declined to apply some of the vary English decisions on which the Board relied in *Shaw-Almex*, *supra*.

11. Nevertheless, we agree with Moldaver J. in *Goodman v. Rossi*, *supra*, that there should be such an implied undertaking, although perhaps modified to suit its purpose. That is, there should not be an implied undertaking with respect to information which can be obtained legitimately outside of the litigation process, but that the use of private information obtained solely through the litigation process should be restricted to the litigation in which the information is revealed, subject to exceptions which are properly developed according to the circumstances of individual cases.

12. Having said all of this, the Registrar is directed to send a copy of the applicant's February 23, 1995 letter to the responding employers (which the applicant appears not to have done).

The responding employers have ten days from the date hereof to make written submissions with respect to the applicant's pre-hearing production request, failing which the Board will deal with the request on the basis of the materials and submissions then before it.

3720-93-R FMG Timberjack Inc., Applicant v. Glass, Molders, Pottery, Plastics & Allied Workers International Union, Responding Party

Bargaining Unit - Combination of Bargaining Units - Remedies - Board in earlier decision directing combination of employer's "parts" and "manufacturing" bargaining units and remaining seized with respect to remedial issues - Employer and union subsequently asking Board to determine unresolved seniority integration issue under section 7(5) of the Act - Board directing that seniority lists be "dovetailed" and that employees of both former "parts" and "manufacturing" bargaining units be credited with seniority from date of hire with the employer

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *W. A. Correll* and *H. Peacock*.

APPEARANCES: *Carl Peterson* and others for the applicant; *Joanne McMahon* and others for the responding party

DECISION OF THE BOARD; February 28, 1995

1. This is a combination application in which the parties request an order pursuant to the provisions of subsection 7(5) of the *Labour Relations Act*.
2. In a decision dated April 18, 1994, the Board granted the employer's request for a direction combining the "parts" and "manufacturing" bargaining units at its Woodstock, Ontario facility. However, despite the parties' joint request at the hearing held that day that the Board further determine the nature of the resulting seniority list, the panel hearing the matter declined to make any further remedial direction in this respect until the parties had the opportunity to resolve that issue through the normal processes of collective bargaining.
3. It appears that notwithstanding their further efforts to effect an agreement on the seniority question, that matter remains outstanding. In correspondence directed to the Registrar, the Board was advised by the parties that they had engaged in further negotiations that resulted in the conclusion of a single collective agreement covering employees formerly belonging to both bargaining units, and resolving all outstanding issues between them with the exception of the seniority question and a closely related issue regarding the applicability of a job classification in the collective agreement. In the same correspondence, the parties renewed their joint request that the Board exercise its discretion pursuant to section 7(5) of the Act to make directions so as to resolve those issues. Accordingly, in order to determine the nature of the relief, if any, that should issue, a further hearing was held on October 21, 1994 to hear the parties' submissions on that matter.
4. Section 7 of the Act provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

The Nature of the Dispute

5. Throughout these proceedings and during bargaining, it has been the thrust of the applicant employer's position that a "dovetailing" of the two seniority lists is appropriate. Under this proposal, all the employees involved in the combination of the units would have their seniority calculated on the basis of their date of hire with the company. The trade union, although rejecting the dovetailing procedure, nevertheless has declined to advance a single position. Instead, it merely advanced for consideration the diametrically opposed interests of the employees in the formerly separate bargaining units. In order to appreciate the nature both of the dispute and of the positions taken by the parties, it is useful to review the facts underlying the differences between them.

6. The applicant employer operates a facility in Woodstock, Ontario for the development, manufacture and distribution of machines and service parts related to the forestry industry. Until

the events giving rise to this application, the employer engaged in both manufacturing and parts distribution/warehousing undertakings, employing some 365 and 14 persons, respectively. The parts unit remained distinct from the remainder of the employer's operations, and although housed in the same facility, they were physically separated by a wall. Both the employees in the manufacturing and parts aspects of its operations were represented by the same local of the responding party trade union. However, bargaining occurred along separate lines resulting in separate, but similar, collective agreements. In early 1994 the employer engaged in a reorganization of its operations that included a substantial reduction of the parts warehousing function and the organizational integration of the remaining parts function with the manufacturing processes. It is unnecessary to review the details of that reorganization. For the present purposes, the significant event in this process was the integration of the remaining parts function (now consisting of four employees) and the manufacturing operation.

7. Immediately prior to the reorganization, approximately 37 of the 365 employees in the manufacturing operations were classified as "material handlers" under the terms of the manufacturing collective agreement, and were variously engaged in the receiving, picking and placement of parts for the purposes of manufacture. It is important to note that the material handler classification is essentially an omnibus one that, during a previous round of bargaining, was incorporated into the collective agreement by virtue of the amalgamation of several related classifications. We take it to be the parties' clear intention for that classification to encompass a wide variety of analogous functions. Moreover, the material handler position has been and remains a preferred assignment in the manufacturing unit, as is reflected by the fact that substantial seniority is required to achieve incumbency in that position.

8. The work of the parts employees prior to the reorganization shared numerous characteristics with the work of a number of the material handlers in the manufacturing unit, although it differed in a number of discernible respects. Thus, the work of the parts employees entailed receiving, picking and placement functions, but was for the most part related to shipping. However, as a result of the reorganization, the work of the former parts employees and of a significant number of the material handlers has become essentially the same and now involves the loading and unloading of product, the movement of materials either by hand or by means of basic material handling equipment, and the counting, sorting, packing, and unpacking of parts, finished and semi-finished goods. Aside from the different destinations to which the parts are shipped, and the differing responsibilities with respect to record keeping that are involved, the employees now perform the same basic functions, for the most part working side by side. Especially when it is considered that, with a minimal process of familiarization, employees performing the parts positions and the material handler positions are functionally interchangeable, we are satisfied that any remaining distinctions between the two positions are insignificant for purposes of classification.

9. As noted above, at the hearing in April, 1994, the Board directed that the two units be combined, but declined to make any direction at that time with respect to the seniority issue. Both collective agreements had expired as of March 31, 1994, and in the ensuing negotiations, although the contentious seniority issues were not resolved, it was agreed that all the employees of the employer would be covered by the terms of the manufacturing facility collective agreement. Shortly thereafter, the parties concluded a new collective agreement, covering all of the employees, but subject, of course, to the resolution of the seniority issues.

10. The parameters of the remaining dispute may be summarized as follows. It has been the employer's position throughout this process that the seniority lists of the two units ought to be merged on a basis that gives equal credit for service with the employer, that the employees formerly under the "Parts" collective agreement would retain their positions, but that given the vir-

tual identity of function to persons performing work under the “material handler” classification as set out in the manufacturing collective agreement, they would be classified as such under the new collective agreement.

11. By contrast, given the disparate interests of the members of the formerly separate bargaining units now compelled to bargain as one, the situation of the trade union was a particularly complex one. Indeed, the prospect of joint bargaining appears to have sharpened some of the long-standing hostilities between the two groups, no doubt contributing to the rather intractable positions forwarded by them. The former manufacturing unit, which was by far the larger of the two units, sought that the four positions currently held by “parts” employees be declared vacancies, that the resulting vacancies be filled through the normal procedures under the collective agreement (in which seniority is an important component), and that the former parts employees were to be credited with no seniority. Given the current layoff situation, it is important to note, the effect of this proposal would be to place all of the parts employees on the lay-off list. By contrast, the former Parts unit sought what is in effect a seniority enclave for their work. Under their proposal, they would retain their separate classifications from the Parts collective agreement with full seniority, and although they would be otherwise subject to the terms of the manufacturing collective agreement, employees from the manufacturing unit would not be permitted to “bump” into jobs in those classifications.

12. It appears that the trade union was unable to mediate a common position between the two groups and, of course, resort to democratic processes was not a viable method of protecting the interests of parts employees given the disparity in size between the units. Instead, both at bargaining and during these proceedings, the union merely gave voice to the widely disparate and, as counsel for the trade union frankly conceded, rather extreme positions of the respective groups of employees. It appears that the single issue upon which the employees of the two respective units were able to reach consensus was a rejection of the employer’s “dovetailing” proposal. Not surprisingly, no agreement could be reached between the trade union and the employer when these issues were discussed at bargaining.

Should the Board Exercise its Discretion Under Subsection 7(5)?

13. The Board is conscious that the legislation granting it remedial authority under section 7(5) was not intended to replace the processes of collective bargaining with a general interest arbitration function. To this end, the Board has consistently refused to embark upon determinations involving the setting of terms of collective agreements until the parties have fully explored their own solutions for the transitional difficulties that might arise from the combination of bargaining units. At the least, the Board has required the parties to make reasonable efforts to resolve the outstanding disputes by way of full and rational discussion. (See, in particular, *Olympia & York Developments Limited*, [1994] OLRB Rep. May 583.)

14. At the same time, we are mindful that the grant of discretion set out in subsection 7(5) of the Act is expressed in extremely broad language. The Board has been empowered to amend “any” term of a collective agreement, and in addition, to make any order that it sees fit. We take this to be indicative of the Legislature’s clear intention that the Board be in possession of sufficient authority to give practical effect to its combination orders, and that of necessity, this may involve the Board in adjudicating upon or otherwise determining the terms and conditions of collective agreements.

15. With this in mind, the parties’ access to the exercise of the Board’s remedial powers under subsection 7(5), while it must be sufficient to achieve the statutory objective, cannot be “automatic”. In determining whether to adjudicate upon or otherwise dispose of the matters placed

before it in such circumstances, the Board must bear in mind the broader labour relations values inherent in the statute, one of the most significant of which is the freedom of parties to negotiate the terms and conditions of their collective agreements. The task for the Board in each case will be to draw an appropriate balance between these often competing imperatives.

16. In the present circumstances, it is apparent to the Board that the failure of the trade union to adopt a single position with respect to the seniority issue adversely affected the quality and the nature of the bargaining that took place with respect to that matter. Indeed, it appears that the impasse in negotiations was in large measure attributable to the trade union's forwarding of two extreme, and diametrically opposed, positions. There is no question that the situation in which the trade union found itself was both difficult and, as the responding party to this application, in many respects not of its own devising. Furthermore, it is true that parties have otherwise engaged in a meaningful process of bargaining that has resulted in a "combined" collective agreement. In turn, the seniority issue was discussed on numerous occasions of bargaining and, albeit in the "dual" form described above, positions were exchanged. Nevertheless, in light of the failure of the trade union to take a unified position, it is difficult to conclude that the parties have entirely exhausted the processes of collective bargaining with respect to the seniority issue.

17. It is by no means clear, however, that the interest in negotiated settlement of agreements would be advanced were the Board to direct the present parties to continue their negotiations. It is important to note that the request for the Board to resolve the parties' differences is a joint one and thus, it is also the employer's express preference for the matter to be determined by the Board. Given the nature of the bargaining that has taken place to date, this is not surprising. Although it hardly accrues to the trade union's credit, we are prepared to accept its assertion that it is "unable" to adopt a single position on seniority and that is unlikely to be able to do so in the future. Under such circumstances, not only are we far from confident that further bargaining would serve any constructive purpose, we are also disinclined toward directing the employer to continue to participate in such a process.

18. More generally, we are convinced that collective bargaining interests militate strongly in favour of granting an order of the sort requested. The parties have placed before us a labour relations issue fundamental to their relationship that directly results from a combination direction. That issue simply must be resolved so that the collective bargaining relationship can continue. We see little that would be gained were the present matter to be allowed to run its "normal" course and the dispute to result either in a futile strike or lock-out, or in inherently divisive litigation before the Board or elsewhere. Given that the collective bargaining interests underlying the amendments include the promotion of viable and stable collective bargaining, we simply cannot take it to be the Legislature's intention that the transitional difficulties of the sort encountered by the present parties be resolved in such a manner.

19. In sum, while the Board is concerned that the issue of seniority may not have been the subject of meaningful negotiation, at the same time, we are not convinced that further bargaining with respect to the matter is likely to result in a satisfactory resolution in labour relations terms. On balance, then, we are satisfied that this would be an appropriate case for the Board to make a direction with respect to the terms of the parties' collective agreement.

What Direction Should the Board Make?

20. Upon carefully considering the matter, it is clear to us that the Board should accept the proposal advanced by the employer, in which each employee would be given full seniority credit for their service with the employer, and in which the employees formerly subject to the "parts" collective agreement would retain incumbency in their positions, but classified in the material han-

dler classification. An important reason for our so finding relates to the failure of the trade union to adopt a unified position either during the course of bargaining, or in the subsequent proceedings before the Board. While in some circumstances such a failure may result in the Board altogether declining to exercise its remedial powers, for the reasons expressed above, we do not find that to be an appropriate response in the present case. In the present circumstances, however, the union's advancing of two diametrically opposed positions strongly inclines us toward placing little credence in either of those positions.

21. We are, in any event, persuaded that the dovetailing proposal of the employer represents the most equitable and feasible reconciliation of the interests involved in this dispute. As this case has demonstrated, seniority constitutes a fundamental collective bargaining right for employees, in which their investment of service with a particular employer can be redeemed for such critical goods as job security. The parties themselves have recognized the significance of this principle in their own collective agreements: a wide range of employee rights and benefits, including, of course, job security, are regulated in whole or in part on the basis of seniority. In each case, seniority is calculated on the basis of the date of hire with the employer.

22. In light of the significance of that right, it is widely accepted in the labour relations case-law that employees' accumulated seniority ought not to be abrogated except in the most unusual circumstances. For that reason, we are persuaded that a resolution that least undermines the important labour relations expectation that seniority will be accumulated from the date of hire must be considered a starting point for discussion of any resolution of seniority disputes.

23. Furthermore, especially in the circumstances of a combination of bargaining units in which both units share a history of allocating employment rights on the basis of seniority, a procedure which recognizes the equality of the seniority of the respective groups is one that is most consistent with the overall structure of the combination provisions of the Act. There is nothing in the language of section 7 or elsewhere in the Act to suggest that the relative "status" of units to be combined by way of a Board direction is anything but one of equality for labour relations purposes. This suggests to us strongly that the seniority claims of the employees in the respective groups ought to be accorded correspondingly equal treatment.

24. It is clear to us that a "dovetailing" procedure, in which employees' relative seniority would be based on their length of continuous service with the present employer, is a method of merging of seniority lists most consistent with the principle of retention of seniority and the equal status of the respective groups. There are, to be sure, circumstances in which a resolution of a seniority list dispute in a manner other than dovetailing might be appropriate. (See for example, *Great Atlantic & Pacific Tea Company Limited*, [1986] OLRB Rep. Apr. 485). However, such circumstances are not before us in the present application. Instead, the circumstances of the present case can fairly be described as typical of the combination applications handled by the Board. Both groups before us have been employed by the same employer, and have been engaged in essentially the same enterprise, in the same plant, performing related and in many respects similar work. In that respect, both their starting points and their economic prospects must be considered as essentially equal. Moreover, they have been represented by the same trade union, and, given the similarity of their collective agreements, have enjoyed the same terms and conditions of employment and have earned seniority-based benefits at substantially the same rate. In our view, the dovetailing proposal of the employer, in which each employee is credited with his or her full service with the employer, and in which the seniority claims of the respective groups are treated as equal, most accurately captures the equities inherent in such circumstances.

25. By contrast, the draconian result contemplated by the proposal of the manufacturing

employees flows from the premise that the parts unit is to be considered as “inferior” for purposes of the combination. There is foundation neither in policy, as described above, nor in fact to support such an assumption. Although it is the case that the size and function of the parts unit has been significantly reduced, it remains a viable aspect of the employer’s overall operations and its process of integration into the larger unit can be characterized as one of mutual accommodation. In this respect, we do not accept the analogy of an accretion upon the sale of a bankrupt operation, suggested by the manufacturing unit. Furthermore, it is only if the inferior status of the parts unit is assumed that the positions currently held by the parts employees can be construed as vacancies subject to the displacement provisions of the collective agreement. To repeat, there is no basis to such an assumption in the present circumstances.

26. Similarly, the proposal of the former parts employees, which would create a seniority enclave effectively insulating their positions from the seniority-based claims of other employees, harmonizes neither with the policy underlying the statute nor with the provisions of the collective agreement. The Board has stated on a number of occasions that the policy rationale underlying broader-based bargaining includes the facilitation of lateral mobility amongst employees and the development of a common set of conditions of employment (*National Trust*, [1986] OLRB Rep. Feb. 250, *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523). The proposal of the parts unit would do little to serve such interests, and by exempting the jobs in question from the operations of some of the most significant provisions of the collective agreement, could fairly be seen as undermining the very purpose of the combination order.

27. Moreover, the parts employees’ position, if implemented, would have the effect of creating a windfall for that group by placing them into what is effectively a superior position. We have already found that there no longer exists a factual basis upon which to found a distinct classification for the former parts employees in that they perform essentially the same functions as the material handlers in the manufacturing unit. Similarly, the further factual premise upon which the seniority island proposal appears to have been based, i.e., that the parts function is not as responsive to downturns in the economy as the manufacturing operations, is belied by the fact of the employer’s reorganization. There appears to be no basis to support a claim that the parts position is an inherently more secure one, and we see no reason to exclude it from the operation of the displacement provisions of the collective agreement.

28. Further, it is noteworthy that the seniority island proposed by the parts unit would create at least two significant anomalies within the collective bargaining relationship as negotiated by the parties. As described above, prior to the events of the reorganization, the union and the employer created the “material handler” classification to encompass the job functions previously performed by a series of analogous classifications. We interpret this bargaining history to express the parties’ intention to avoid the placement of barriers to the operation of the job security provisions of the collective agreement based on minute differences in job function. To endow the parts employees with a separate classification at this stage would in effect be pushing the process of collective negotiations backwards. Even more significantly, as a result of many years of negotiation, the displacement provisions of the collective agreement now operate on a plant-wide basis. In light of the importance that such a principle plays in the overall collective bargaining structure negotiated by the parties, we are most reluctant to grant the parts employees exemption from its operation in the absence of any compelling reason to do so.

29. On balance, then, we are confident that the proposal forwarded by the employer is the most consonant with the purposes of the combination provisions of the Act, with the structure of the collective bargaining relationship that the parties have established in their collective agree-

ments, and constitutes the fairest balance of interests between the various groups. Accordingly, we direct that:

1. the employees of both the former parts and manufacturing collective bargaining units be credited with seniority from the date of their hire with the employer;
2. that the positions held by the remaining employees formerly under the parts collective agreement now be classified under the "material handler" classification of the collective agreement currently in effect;
3. that the employees formerly in the parts bargaining unit retain incumbency in the positions that they currently hold subject to the normal operation of the provisions of the collective agreement.

30. The parties at the hearing indicated that they anticipated no difficulty in rendering any direction made by the Board into language appropriate to their collective agreement. Accordingly, we leave the matter of drafting to them. In the event that they encounter any difficulty in this regard, or in any other respect, the Board remains seized with respect to further remedial questions.

2988-94-U; 2989-94-R United Food & Commercial Workers International Union, Local 175, Applicant v. Frade's Fruit Ltd., Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Thunder Bay employer asserting inability to finance conduct of proceedings in Toronto and declining to attend hearing into union's certification application and unfair labour practice complaint - Board explaining its travel policy in respect of "fast-track" cases - On basis of uncontradicted evidence, Board finding employer in violation of Act in discharging key union organizer and known union supporter - Reinstatement ordered - Union certified under section 9.2 of the Act

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *P. R. Seville*.

APPEARANCES: *Kelvin Kucey* for the applicant; no one appearing for the responding party.

DECISION OF THE BOARD; February 8, 1995

1. Board File No. 2988-94-U is an application under section 91 of the *Labour Relations Act*, alleging a breach of sections 3, 65, 67, 71 and 82 of the Act. Board File No. 2989-94-R is an application for certification under section 9.2 of the Act.

2. In a decision dated November 24, 1994 in Board File No. 2987-94-M, another panel of the Board directed the interim reinstatement of two employees, Shawn Thomasson and Barbara Fraser, pending the resolution of the section 91 complaint.

3. The employer did not attend the hearing in Board File No. 2987-94-M, nor in the matters before us. The reason for the employer's non-attendance, as communicated in letters to the

Board seeking a hearing of this matter in Thunder Bay, was its inability to finance the conduct of proceedings in Toronto.

4. The Board is not unsympathetic to parties who may feel themselves unable to participate, or participate adequately, in Board proceedings for financial reasons. However, the Board's own increasingly limited financial resources means that this may occur in some cases. Simply stated, the Board is not able to travel out of town in all, or even many, of those cases in which one or more of the parties may request it. The Board's current travel policy, arrived at after both internal discussion and external consultation, is not to travel out of town for those time-sensitive cases that fall within its "fast-track" scheduling system. These cases include:

- (i) Applications for interim relief under section 92.1;
- (ii) Expedited unfair labour practice complaints under section 92.2 of the Act;
- (iii) Complaints with respect to unlawful strikes or lock-outs under sections 94, 95 and 137 of the Act;
- (iv) Expedited applications and complaints with respect to replacement workers under sections 73.1 and 73.2 of the Act;
- (v) Applications and complaints with respect to organizing and picketing on private property under section 11.1 of the Act;
- (vi) Jurisdictional Dispute complaints under section 93 of the Act;
- (vii) Applications for certification and for termination of bargaining rights;
- (viii) Applications for first contract arbitration under section 41 of the Act;
- (ix) Applications and complaints alleging unlawful termination of employment under the *Occupational Health and Safety Act*, the *Environmental Protection Act*, the *Smoking in the Workplace Act*, the *Colleges Collective Bargaining Act*, and under sections 65, 67, 71, 81, 81.2 or 82 of the *Labour Relations Act*;
- (x) Applications under sections 41.1, 81.1 and 138.1 to 138.6 of the Act.

5. The reasons for this policy were articulated by the Board in *Hemlo Gold Mines Inc.*, [1993] OLRB Rep. Mar. 158, as follows:

... Funding and personnel limitations render it impossible for the Board to schedule fast-track cases outside of Toronto, as the system involves having on standby for fast-track and other expedited cases a rotating pool of Vice-Chairs and Board Members who, as cases settle or finish being heard, are frequently re-assigned to other urgent matters, often on a rush basis which would not be possible if a fast-track panel were in a location away from Toronto such as Thunder Bay. ...

This policy represents the Board's best effort at balancing the needs of its constituency with its own operational requirements and financial resources. As the present case falls within the fast-track and presented no unusual circumstances, the Board determined that it would hear this case in Toronto.

6. The union called two witnesses to testify in these proceedings, Barbara Fraser and Tracey Talarico. The following is a summary of their uncontradicted evidence.

7. The employer operates a fruit market at two locations in the City of Thunder Bay. The first location is on May Street. The second is on Wardrobe Street. The official opening of the Wardrobe Street store was on October 31, 1994. The bargaining unit agreed upon between the parties

encompasses both stores and includes 17 employees. The majority of these employees work at the May Street store.

8. Barbara Fraser was hired by the employer as a cashier on September 19, 1994. She was hired by Dorothy Faflak, the mother-in-law of the owner of the stores, Robert Frade. Ms. Faflak is an employee of the stores but is excluded from the agreed upon bargaining unit.

9. Ms. Fraser came to the employer with ten years experience in the retail food industry working for large unionized companies. Ms. Fraser testified that, shortly after being hired, she became concerned about the working conditions at the May Street store and discussed the possibility of bringing in a union with Tracey Talarico. The two employees then contacted the applicant, and commenced an organizing campaign the next day.

10. From November 15 until the first week in December, Ms. Fraser and Ms. Talarico approached several employees about joining the union. Two or three employees expressed concerns about signing cards, saying that they were afraid of being fired or that they were "not sure how the employer would take it".

11. Apparently, Mr. Frade had held a meeting of employees in June at which he announced his intention to open the Wardrobe Street store and at which he indicated that if anyone ever tried to bring in a union he would close the May Street store and all of the employees would be out of jobs. A similar thought was conveyed to Barbara Fraser at the time she was hired by Dorothy Faflak. Ms. Faflak told Ms. Fraser that if anyone tried to bring in a union they would either "lock the doors" or the person responsible would be fired.

12. During this three-week period, Ms. Fraser and Ms. Talarico were successful in obtaining two other signatures on union cards, including that of Shawn Thomasson. These two cards, along with those of Ms. Fraser and Ms. Talarico, were the only ones submitted with the application.

13. On November 2, 1994, Ms. Fraser was asked by Mr. Frade to transfer to the Wardrobe Street store because an experienced cashier was needed to "show the ropes to the other girls". Ms. Talarico testified that Ms. Faflak and Mr. Frade had said that Ms. Fraser was an excellent cashier. Other employees had indicated that she was "great with customers". Ms. Fraser was offered a \$1.00 an hour increase, but declined the transfer. Two days later, Tracey Talarico accepted the transfer on a short-term basis, commencing employment at the Wardrobe Street store on November 7, 1994.

14. On November 4 or 5, 1994, Ms. Fraser spoke to another employee, Kelly Eagles, about joining the union. Initially, Mr. Eagles displayed some interest in the union and asked a number of questions. Upon finding out, however, that Ms. Fraser had already spoken to the applicant and that four signatures had already been obtained, Mr. Eagles' appeared to lose interest. He began suggesting that unions are trouble and that if one got in Mr. Frade would close the doors. During the course of this conversation, Ms. Fraser advised Mr. Eagles of the names of the four people who had already signed cards. Ms. Fraser had also recently given this information to another employee, Sharon Lockert, who also declined to sign a card.

15. On November 5, 1994, Shawn Thomasson's employment was terminated. The reason given for Mr. Thomasson's termination was lack of work.

16. On November 8, 1994, Mr. Frade approached Tracey Talarico at the Wardrobe Street store, indicating that he had learned of the union organizing campaign and asking why employees

were interested in a union. According to Ms. Talarico, Mr. Frade said that if the union came in he would close the May Street store and operate the Wardrobe Street store with members of his family. Mr. Frade also said that he would "like to find out who brought the union in".

17. On November 14, 1994, Ms. Fraser's employment was terminated. No reason was given for the termination.

18. On November 17, 1994, Tracey Talarico returned to the May Street store. Shortly thereafter, Ms. Talarico, asked Ms. Lockert if she knew why Ms. Fraser had been fired. Ms. Lockert replied that all she knew was that "Barb had been talking about the union too much". Ms. Talarico also approached another employee at this time to attempt to solicit membership. She was advised by the employee that she did not wish to lose her job and would wait to see "what happened". Overall, it was Ms. Talarico's impression that, after the terminations, employees were simply too scared to even discuss the union.

19. On November 21, 1994, the application for certification was filed. On November 25, 1994, Mr. Thomasson and Ms. Fraser were reinstated in their employment on an interim basis as a result of the Board's order referred to in paragraph 2 of this decision. It was the evidence of Ms. Fraser and Ms. Talarico that even after the reinstatements employees were simply too scared to discuss the union. Ms. Fraser also testified that she has been ostracized by her fellow workers.

20. Finally, on December 8, 1994, the accountant, Cory DeVries, who is also excluded from the agreed-upon bargaining unit, distributed the following four-page questionnaire to all employees with instructions that it be returned to Mr. Frade for use by his lawyer:

QUESTIONNAIRE RE: UNIONIZATION

Please answer the following questions:

- 1) To the best of your information and belief were the terminations of Roberta Fraser or Shawn Thomasson related to their unionization activities.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 2) Did Frade's Fruit Ltd. refuse to employ or continue to employ any person or any employee or threaten any dismissal of any employee.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 3) Did Frade's Fruit Ltd. discriminate against any employee in regard to their employment or intimidate or coerce or impose a pecuniary or other penalty on any employee because of their involvement in the unionization of Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 4) Are you aware of any interference by the owners or operators of Frade's Fruit Ltd. with respect to the formation, information and/or selection of a trade union within Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 5) Has Frade's Fruit Ltd. refused to employ or continue to employ any person because the person was a member of a trade union or attempted to organize a trade union within Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 6) Has Frade's Fruit Ltd. imposed any condition in your contract of employment as a result of your participation in attempting to unionize Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 7) Has any of the owners or operators of Frade's Fruit Ltd. threatened to dismiss you because you are involved in the formation of a union within Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 8) Has any of the owners or operators of Frade's Fruit Ltd. attempted to intimidate or coerce you from becoming a member of a trade union.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 9) Are you unable to express your true wishes respecting the formation of a trade union within Frade's Fruit Ltd. because the owners or operators of Frade's Fruit Ltd., or persons acting on behalf of them, have attempted to coerce or intimidate you.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

- 10) Has anything said or done by the owners or operators of Frade's Fruit Ltd. affected your ability to freely decide if you wish to unionize Frade's Fruit Ltd.

☐ Yes ☐ No ☐ Not Sufficient Information to Answer this Question

Comments: _____

By signing and completing this questionnaire, I acknowledge that I understand the nature and effect of the answers I have provided and further that I have answered such questions of my own volition and without fear, threats, compulsion, undue influence or duress by any other person or my employer.

Name

Date

Position

21. On the basis of the foregoing, the Board is satisfied that the employer has breached the provisions of sections 65, 67 and 71 of the Act by terminating the employment of Shawn Thomasson and Barbara Fraser. Those provisions state:

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or

administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

22. Ms. Fraser was a key union organizer and Mr. Thomasson was a known union supporter. In the absence of any evidence to contradict that of Ms. Fraser and Ms. Talarico, we are satisfied that the only reasonable inference to draw from all of the circumstances is that the employment of both Ms. Fraser and Mr. Thomasson was terminated, at least in part, because of their support for the union. Accordingly, the Board hereby confirms the order of November 24, 1994 reinstating these employees, and will remain seized with respect to any issue of compensation.

23. We are also of the view that, though the terminations of Mr. Thomasson and Ms. Fraser, Mr. Frade's statements in June, and the subsequent distribution of the questionnaire in the workplace, a climate of fear has been created that would render it impossible for the "true wishes of the employees ... respecting representation by a trade union" to be ascertained. Accordingly, and on the basis of the evidence before us, we hereby certify the applicant under section 9.2 of the Act as the bargaining agent for the following agreed-upon bargaining unit, which we find to be appropriate for collective bargaining:

all employees of Frade's Fruit Ltd. in the City of Thunder Bay, save and except Assistant Managers, persons above the rank of Assistant Manager and Bookkeepers.

24. A certificate will issue to the applicant.

OPINION OF BOARD MEMBER J. A. RUNDLE; February 8, 1995

1. As the Board correctly notes in paragraph 3, of the decision, the employer did not attend the hearing in Toronto for the two cases that are the subject matter of this decision, nor did it attend in Toronto on a previous case. It is important to note why the employer did not attend in Toronto.

2. Several requests were made by counsel for the employer to hold the hearing in Thunder Bay. In a letter dated December 7, 1994 employer counsel cited seven reasons in support of its change of venue request. All seven reasons related to the financial impact the hearing would have on the employer's business if it were to be held in Toronto. The Board denied the request for change of venue and the hearing proceeded in the absence of the employer. I would note that the employer attended all Board Officer meetings that were held in Thunder Bay.

3. The Board in exercising its mandate must do so within certain financial restraints - one accepts this reality. However the policies established by the Board, in this case the travel policy, must not be so restrictive as to preclude those whom the Board is mandated to serve from having equal access to the process. The Board cannot be accessible only to those who can afford to attend in Toronto thereby diminishing the rights of those who reside outside Toronto to exercise legitimate legal claims under the Act. The Board's policies must also be flexible to take into account the specific needs of individual parties, particularly if the policies consistently work to the advantage (and privilege) of certain parties over others.

4. The fundamental principle inherent in the *Ontario Labour Relations Act* is the *right of an individual* to choose whether or not they wish to belong to a trade union. The Board's policies cannot be seen to inhibit this basic principle - the right of the individual to choose. It follows that those who lack the resources to attend in Toronto would also lack the resources to pursue an unsatisfactory result in other forums. Within the financial restraints mentioned above, the Board must manage its resources and constantly review its policies so as to ensure a fair balance of the needs of all the communities it serves in carrying out its mandate.

0883-94-R Teamsters Local Union No. 879, Applicant v. G.S. Dunn & Co. Limited, Responding Party

Certification - Constitutional Law - Reconsideration - Employer's business including operation of mustard seed elevators - Employer seeking reconsideration of decision certifying union on ground that labour relations of employer falling in federal jurisdiction - Board not accepting argument that elevators operated by employer equivalent to elevators declared to be works for the general advantage of Canada under *Canada Grain Act* in that they perform similar function and should therefore also be found within federal jurisdiction - Board satisfied that employer's labour relations properly subject to provincial regulation - Reconsideration application dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Rundle* and *D. A. Patterson*.

DECISION OF THE BOARD; February 20, 1995

1. This is a certification application in which the Board, by decision dated July 4, 1994, certified the applicant (also referred to herein as the "union" or the "Teamsters") as the bargaining agent for a group of employees represented by this employer (also referred to herein as "G.S. Dunn").

2. By application dated September 21, 1994, the employer requests reconsideration of that decision, seeking essentially the revocation of the certification on the basis that the Board has no constitutional jurisdiction over the labour relations of the employer. By decision dated November

18, 1994, the Board directed further submissions from the parties with respect to certain issues. We have before us, among other things, the request for reconsideration, submissions of the union dated October 17th, further submissions by the employer (received November 4th) in response to a direction from the Board, and further submissions dated November 30th, December 7th, and December 16th in response to the Board's decision of November 18th. The employer objected to the Board's receipt of certain submissions from the union dated November 10th; it is unnecessary in any event for us to make reference to them.

3. Having reviewed the materials, we are satisfied that the question can be determined without an oral hearing, since the facts which support the request for reconsideration are not disputed by the union.

4. The request for reconsideration rests on the following basic assertions: (a) that the question of whether an undertaking, service or business is within federal jurisdiction depends on the nature of its operations, (b) that the normal and habitual activities of G.S. Dunn as a going concern characterize its operations as a federal business and place its labour relations within the jurisdiction of the *Canada Labour Code* and not the *Labour Relations Act*; further that (c) the mustard seed elevators operated by G.S. Dunn are integral to the objects of the Canada Grain Commission in ensuring the quality of mustard seed and flour for domestic and export markets, and are equivalent for constitutional purposes to elevators which have been declared under the *Canada Grain Act*, R.S.C. 1985, C.G-10 to be works for the general advantage of Canada.

5. The legal argument of the employer with respect to (a) and (b) above is as follows:

2. The determination of the scope of the constitutional jurisdiction of the Ontario Labour Relations Board should be approached from the perspective of determining whether the Board has jurisdiction over the nature of the employer's operation and not from the perspective of whether the Board has jurisdiction over the person of the employer.
3. In *Northern Telecom Limited v. The Communication Workers of Canada and the Canada Labour Relations Board* (1979), 98 D.L.R. (3d) 1, 79 CLLC ¶14,211 (S.C.C.), Mr. Justice Dickson, writing for the Court, quoted the decision of Mr. Justice Beetz in the decision of *Montcalm Construction Inc. v. Minimum Wage Commission*, (1978) 25 N.R. 1. In speaking to the issue of whether the operation of an employer was incidental to a federal undertaking, service or business, Mr. Justice Beetz set out the principles by which a Court may determine the correct jurisdiction to govern the labour relations of an employer's operation.
4. The principles are as follows:
 - (a) Parliament has no authority over Labour Relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
 - (b) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
 - (c) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations in the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
 - (d) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of an undertaking, service or business, are removed

from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one.

- (e) The question of whether an undertaking, service or business is a federal one depends on the nature of its operations.
- (f) In order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of "a going concern", without regard for the exceptional or casual factors; otherwise, the constitution could not be applied with any degree of continuity and regularity.

5. While these principles were applied to determine whether an undertaking, service or business is integral to an area of federal competence and, thus, falls within the jurisdiction of the *Canada Labour Code*, they, too, may be applied to determine whether an employer is a federal undertaking, service or business, outside the exclusive jurisdiction of the province and its legislation and within section 2(i) of the *Canada Labour Code*.
6. Section 2(i) of the *Canada Labour Code* provides for legislative authority over "a work, undertaking or business outside the exclusive legislative jurisdiction authority of the legislatures of the provinces...".
7. To determine if an employer is a federal undertaking, service or business outside the scope of provincial competence, the Board should apply principles (e) and (f), stated above. To ascertain the nature of an employer's operation and bring it within federal jurisdiction, "one must look to the normal and habitual activities of the business as those of 'a going concern', without regard for exceptional or casual factors."
8. Decisions with regard to the constitutional jurisdiction over employers in the business of road transportation conclude that the operations of an employer's business need not be exclusively within the federal domain before they will be considered to fall within the jurisdiction of the *Canada Labour Code*. To fall within federal jurisdiction, the employer need only demonstrate that its operations that are federal in nature occur on a regular and continual basis.

6. Applying the above analysis, the employer asserts that the normal and habitual activities of G.S. Dunn, as a going concern, remove it from the jurisdiction of the *Labour Relations Act*, characterize their operations as a federal business and place them within the jurisdiction of the *Canada Labour Code*.

7. The legal argument for the second branch of the employer's argument is based on the provisions of the *Canada Grain Act*. The *Canada Grain Act* establishes the Canadian Grain Commission, whose objects are to establish and maintain standards of quality for Canadian grain and regulate grain handling in Canada, to ensure a dependable commodity for domestic and export markets: section 13. Section 55 of that Act declares that certain elevators are works for the general advantage of Canada. It is not in dispute that the portion of that Act which defines elevators to include elevators in the geographic region within which G.S. Dunn's elevators are located, has not been proclaimed. The elevators operated by G.S. Dunn thus do not fall expressly within the jurisdiction of the Canadian Grain Commission. It is submitted by the employer that its elevators should, however, by necessary implication, be considered as works for the general advantage of Canada since they further the same objects.

8. The factual basis for the argument can be summarized as follows. G.S. Dunn operates the only dry mustard flour mill in Canada, located in Hamilton. In the operation of the mill, G.S. Dunn has facilities for both seed storage, in a series of seed elevators, and seed milling. All of the mustard seed which is ground into mustard flour at the mill is purchased from companies representing farmers in Saskatchewan, Manitoba and Alberta. Representatives of G.S. Dunn travel to

these provinces for such purposes as negotiating the purchase of seed and inspecting the seed crop and facilities for storing seed. There is regular contact between G.S. Dunn and the companies from whom it purchases seed. Federal health inspectors conduct regular inspections of the employer's facility under the Good Manufacturing Practices and the Food and Drug Act Regulations. Agriculture Canada, through the Canadian Grain Commission, sets agricultural standards for mustard seeds and works with G.S. Dunn and its suppliers to ensure that the seeds supplied to G.S. Dunn are of the required quality. Agriculture Canada inspectors inspect the employer's premises to verify that it meets international agricultural export requirements. About 85-90% of the mustard flour produced by G.S. Dunn is exported to other countries, and 95% overall is exported to customers outside Ontario.

9. Any attempt to resolve a question concerning the division of powers between the federal and provincial governments must begin with the provisions of the *Constitution Act, 1867*. Sections 91 and 92 of that Act outline the areas of federal and provincial competence respectively. Neither makes reference to the subject of labour relations. However, it is now well-established in the caselaw on constitutional division of powers that primary competence over labour relations matters is within the provincial domain, as a matter of property and civil rights in the province. As the Supreme Court of Canada stated in *Northern Telecom Ltd.*, Parliament has no authority over labour relations as such - exclusive provincial jurisdiction is the rule. However, Parliament may have exclusive jurisdiction over labour relations where "such jurisdiction is an integral part of its primary competence over some other single federal subject." In other words, Parliament only has authority over the labour relations of an entity where it can be shown that these labour relations are integrally connected to a matter that is otherwise within federal jurisdiction. For example, the labour relations of the postal service is within the federal domain because the postal service is a subject of federal lawmaking power under section 91(5) of the *Constitution Act, 1867*.

10. The excerpt provided by counsel from *Northern Telecom Ltd.*, *supra*, in support of the first branch of the employer's argument accurately sets out the principles which formed the basis of both *Northern Telecom Ltd.* and *Montcalm Construction Inc.*, two of the leading cases in this area. In counsel's submission, the Board should apply the principles set out in paragraphs (e) and (f) of the summary by Mr. Justice Dickson. Implicitly, counsel suggests that (e) and (f) can be applied without reference to the preceding enumerated principles, and as an alternative approach to the constitutional division of powers from that set out in paragraphs (a) to (d).

11. We find that such an approach misinterprets the nature of the exercise. It ignores the fundamental premise of the analysis undertaken in *Northern Telecom Ltd.* and similar cases: that the exception to the general rule of provincial regulation of labour relations must start with the identification of the federal power at issue, as established by the provisions of sections 91 and 92 of the *Constitution Act, 1867*. The party asserting federal jurisdiction must be able to state that the labour relations is in connection with an activity or entity falling under the federal power to regulate the postal service, the military, shipping, banking, or any one of the matters assigned to Parliament in sections 91 and 92. Once the federal power is identified, the next task identified by the Supreme Court in *Northern Telecom Ltd.* is the determination of whether the ability to govern *labour relations* at the entity in question is integral to the exercise of the valid federal power. It is in connection with this step in the analysis that the decision-maker explores the nature of the operation and its normal and habitual activities.

12. Where an entity does *not* fall within one of the categories of federal power set out in sections 91 and 92, there is no general overriding principle that it may nevertheless be a subject of

federal regulation if its operations are “federal in nature”. Paragraphs (e) and (f) of the enumerated principles in *Northern Telecom Ltd.* and *Montcalm Construction Inc.* are not applied without the context of the preceding principles.

13. It is very clear from the decisions of the Supreme Court of Canada that the list of principles set out is to be applied *in sequence*, and against the framework of the *Constitution Act, 1867*. Mr. Justice Dickson stated in *Northern Telecom Ltd.* that:

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the “normal or habitual activities” of that department as “a going concern”, and the practical and functional relationship of those activities to the core federal undertaking.

14. In *Montcalm Construction Inc.*, the Court as well first considered what class of federal authority it was asserted applied to the undertaking in question. There, it was argued (unsuccessfully) that the construction of runways, including the labour relations pertaining to such activity, was an integral part of aeronautics, a class of subject under exclusive federal authority. It was also argued that the airport as a whole was part of an undertaking connecting a province with a foreign country or extending beyond the limits of the province (as enumerated in section 92 of the *Constitution Act, 1867*).

15. In the case at hand, there is no assertion (apart from the employer’s submissions relating to the *Canada Grain Act*, discussed below) that the employer’s undertaking falls within one of the categories subject to federal regulation by virtue of sections 91 and 92 of the *Constitution Act, 1867*, and the facts do not disclose such. There is also no assertion that the operations of the mustard mill are so closely connected to the activities of a “core federal undertaking” that the entire works should be within federal domain. There is therefore no need to ask the question set out in paragraph (e) above, whose purpose is to define the scope of the federally regulated activities where one work or undertaking has a connection to another which is within federal jurisdiction.

16. Since it is neither a core federal undertaking nor connected to a core federal undertaking, G.S. Dunn does not become subject to federal jurisdiction in its labour relations as a result of its sources of supply, its market, inspections of its facilities or products by federal agencies, nor even as a result of certain aspects of its business being conducted outside of the province.

17. We are supported in our conclusion by the decision of the Supreme Court of Canada in *The King v. Eastern Terminal Elevator Co.* (1925) [1925] S.C.R. 434. In that decision, the Court found federal regulation of elevators to be beyond the powers of the federal government, since it was an effort to regulate local works and undertakings. In Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed., the author refers to the re-enactment of the *Canada Grain Act* in 1926, invoking the federal declaratory power with respect to elevators, as Parliament’s response to that decision.

18. We now turn to a consideration of the second branch of the submissions made by the employer, that the elevators operated by G.S. Dunn are equivalent to elevators declared to be works for the general advantage of Canada under that Act in that they perform a similar function and should therefore also be found within federal jurisdiction.

19. Section 92(10)(c) provides federal jurisdiction over such works which are declared by Parliament to be for the general advantage of Canada, as an exception to overall provincial jurisdiction over local works and undertakings.

20. As indicated above, section 55 of the *Canada Grain Act* contains the declaration origi-

nally enacted in 1926, covering elevators. Section 2 defines “elevator”, distinguishing between elevators located in the “Western Division” and those located in the “Eastern Division”. G.S. Dunn’s elevators are located in the Eastern Division. That portion of section 2 pertaining to elevators located in the Eastern Division has not yet been proclaimed in force. The result of this is that the declaration contained in section 55, which places elevators under federal power, is not effective with respect to the elevators of G.S. Dunn.

21. G.S. Dunn submits that despite the absence of an effective declaration covering the elevators of G.S. Dunn, they should be subject to federal regulation because they further the objects of the Canadian Grain Commission. The very fact, however, that the declaration found in section 55 has never been made effective as regards G.S. Dunn’s elevators, would indicate that Parliament does not treat them as integral to the objects of the Canadian Grain Commission. It is important to note that the result of the failure to proclaim that portion of the definition of “elevator” to include elevators in the Eastern Division means that the provisions in the *Canada Grain Act* concerning licensing and standards for elevators do not apply to G.S. Dunn’s elevators. There is no doubt that mustard seed is a “grain” for the purposes of the *Canada Grain Act*, and certain aspects of the growing, handling, transportation and storage of mustard seed in connection with declared works are regulated by the Canadian Grain Commission under the *Canada Grain Act*. It may be, therefore, as indicated in the employer’s submissions, that the Canadian Grain Commission works to ensure that the seeds produced and supplied to G.S. Dunn meet the standards established by it under the *Canada Grain Act*. However, the operation of the elevators of G.S. Dunn is not directly subject to the authority of the Canadian Grain Commission.

22. Absent a declaration that the elevators of G.S. Dunn are works for the general advantage of Canada, therefore, Parliament does not have authority to regulate their activities and accordingly, the labour relations pertaining to the operation of these elevators are not subject to federal regulation.

23. It was also submitted by the employer that the mustard *mill* operated by it is similar in function, operation and regulation to a mill whose operation is controlled by the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, and because of these similarities, should also be subject to federal regulation in its labour relations. We do need to address this argument in detail. We are not convinced by a submission that constitutional jurisdiction can be decided on the basis of an analogy to a federally-regulated work. Again, absent a valid declaration under the provisions of section 92(10)(c) of the *Constitution Act, 1867*, the regulation of the mill is within provincial jurisdiction.

24. For these reasons, we are satisfied that G.S. Dunn is subject to provincial regulation of its labour relations. We find that the Board had jurisdiction to grant the certificate in this application, and we accordingly find no reason to reconsider or revoke our prior decision.

25. It was unnecessary for us to address the arguments made by the union with respect to the timeliness of the request for reconsideration.

CONCURRING OPINION OF BOARD MEMBER J. A. RUNDLE; February 20, 1995

1. I have reviewed the decision of the majority and I concur in the result. However, my concurrence is subject to the comments that follow.

2. The employer concedes that its operations are not the subject of an express declaration under either the *Canada Grain Act* or the *Canadian Wheat Board Act*, the effect of which is to bring certain works under federal jurisdiction as being for the general advantage of Canada. The

employer argues, however, that its works are similar to works which are subject to declarations, and accordingly should be under federal jurisdiction by analogy.

3. Constitutional questions cannot be determined “by analogy”. Works are either the subject of a proper declaration, or they are not, and constitutional jurisdiction must follow accordingly.

4. However, I am not at all certain that the failure to proclaim in force subsections 55(2) and (3) of the *Canada Grain Act* necessarily leads to the conclusion that all grain elevators in Eastern Canada are under provincial jurisdiction. It is at least arguable, in my view, that the failure to proclaim these subsections in force means that the general declaration found in s. 55(1) of the *Act* applies.

5. We have had no submissions on the point, and in view of the employer’s concession that its works are not the subject of a s. 55 declaration, we have no option, in my view, but to hold they are under provincial jurisdiction. However, in my opinion the Board should refrain from pronouncing on the interpretive question until it is squarely presented for decision.

2454-94-R; 2838-94-U United Brotherhood of Carpenters and Joiners of America Local 1072, Applicant v. **Jones Wood Industries Inc.**, Responding Party v. Group of Employees, Objectors

Certification - Evidence - Membership Evidence - Practice and Procedure - Evidence before Board disclosing that individual whose name appeared as “witness” on union’s membership evidence did not actually see employees sign their cards - Board dismissing union’s motion that it not inquire further into matter as raising no *prima facie* case of misconduct or irregularity - Board, however, not agreeing that evidence before it making out *prima facie* case warranting inquiry into Form A-4 filed by union

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. M. Sloan* (dissenting in part) and *K. Davies* (dissenting in part).

APPEARANCES: *Marisa Pollock* and *Joe Almeida* for the applicant; *Bill Anderson* and *Reinhard Zank* for the responding party; *Daniel J. McKeown*, *Daniel Stoikoff*, *Ghansham Maharaj* and *Kiem Lam Nghiem* for the objectors.

DECISION OF THE BOARD; February 2, 1995

1. This is an application for certification which has been combined for hearing with a complaint of unfair labour practices. The Board commenced hearing this case on December 13, 1994.

2. In the certification application, there are outstanding disputes with respect to the description of the bargaining unit, the composition of the bargaining unit, and allegations that the union’s organizers intimidated employees into joining the union. The union asks the Board to invoke section 9.2 of the *Act* if it is not entitled to automatic certification.

3. The parties agreed to defer the bargaining unit issues pending the resolution of the

other issues. The Board directed the parties to lead all of their evidence on all the issues relating to the allegations of union misconduct and the union's complaint of unfair labour practice. The objecting employees agreed to proceed first, followed by the employer and then the union.

4. On December 15th, after hearing the evidence of Kiem Lam Nghiem, the Board brought certain facts to the parties' attention. Mr. Lam testified that he signed a membership card in the union at home. He testified that he brought the card to work the next day, gave it to another employee and asked that employee to give the card to Jimmy Smith. The Board reviewed the membership card submitted on Mr. Lam's behalf (which had not been disclosed to any of the parties other than the union). The card bears a line which is preprinted in the following manner: "Signature of Applicant X_____". Immediately below this, the card bears a line which is preprinted in the following manner: "Witness X_____". The "Applicant" portion is signed by Mr. Lam. The "Witness" portion is also signed. Because of Mr. Lam's evidence, it was not apparent that the person who signed as a "Witness" actually saw Mr. Lam signing his card. The Board brought all of this to the attention of the parties, indicating that by doing so, the Board did not intend to state that these circumstances have a bearing on the application. The Board invited the parties to consider the matter in order to determine their respective positions.

5. At the conclusion of the hearing on December 15th, the Board set continuation dates for this matter, starting on January 30th. The parties were asked whether they intended to take any position with respect to the facts disclosed. Counsel for the responding party indicated that he definitely intended to raise an issue with respect to those facts. The parties were directed to place the matter in writing as soon as possible.

6. The Board received correspondence from the responding party and from the objecting employees in relation to this issue dated January 19 and 23, 1995. In this correspondence, among other things, it is alleged that by signing as "Witness", the card collector at issue has represented to the Board that he knows by direct evidence that the employee has signed the card, which is false. It is submitted that any membership evidence submitted by this collector should be given no weight.

7. The hearing re-convened on January 30th. It should be noted that the union has supplied opposing counsel with blank forms of its membership cards. At the outset of the hearing on January 30th, the union also agreed to disclose the identity of the person whose name appears as the "Witness" on Mr. Lam's card, and the fact that the same person appears as the "Witness" on twenty-five cards submitted by the union. The employer and objecting employees reiterated their positions regarding the effect of the circumstances surrounding Mr. Lam's card. In the course of their submissions, they also appeared to take the position that the Form A-4 submitted with this application is defective, because its declarant cannot know who actually signed the membership evidence. For its part, the union made a motion that the Board ought not inquire further into this matter, since it raises no *prima facie* case of misconduct or irregularity which would have a bearing on the application.

8. After hearing the submissions of the parties, the Board made the following oral ruling, which has been edited for clarity:

The Board declines the union's request to not inquire further into the issue of the witnessing of the union's membership evidence. The potential effect of these circumstances is a determination that the Board prefers to make having *all* of the evidence before it.

Having said that, the Board (R. M. Sloan reserving his decision) does not see a *prima facie* case that would warrant inquiring into the Form A-4. There is no reason to believe on the basis of the material and evidence before us, that there are any non-sign problems with the membership evidence.

There is no reason to believe on what we have before us that the declaration was not made with the requisite inquiry and information. It is important to be clear about the issues. There is a difference between flawed membership evidence which may have an effect on the application because of the Board's rejection of those cards themselves or the weight to be given to the cards, and flawed membership evidence which may have an effect on the application because they call into question the very specific declaration which is contained on the A-4.

The Board sees a basis for proceeding to hear the issue of the manner in which these cards were witnessed. However, we will not permit this hearing to turn into a free-ranging inquiry into the collection of the cards in general and the completion of the A-4.

With respect to the manner of hearing this issue, we cannot rule out that at the end of the day the Board's discretion may be called upon. We do not therefore find it appropriate in the circumstances to separate out this issue from the other issues in the hearing before us. The parties are expected to lead all their evidence on all issues which are before the Board in this stage of proceedings.

9. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043, to which we were referred, a similar situation arose where the Board was asked to inquire into the completion of the Form 8 [now Form A-4]. The Board stated in that decision:

30. The Board accepts the Form 8 attestation on its face unless allegations are made which, if proven, would cause the Board to find that the statements attested to therein are false. If such an allegation is made the Board will conduct an inquiry into the bona fides of the Form 8. Counsel for the company relies on evidence given before the Board which he maintains establishes that Mrs. Lamb accepted cards between April 17 and April 24, 1978, thanked the person submitting the cards, said nothing further and mingled these cards with other cards such that she could not identify the individual cards submitted to her at the time. Even if these alleged facts were to be proven in the course of a Form 8 inquiry, they would not of themselves support a finding that the Form 8 filed in this matter constitutes a false declaration. A Form 8 is not defective merely because inquiries were not made of the collector(s) at the time cards are submitted and neither is it defective if the inquiry is not on a card by card basis. It is sufficient that each collector be asked at a time prior to the signing of the Form 8, whether or not he received one dollar or other suitable payment from each of those he signed into membership and on whose behalf he submitted membership cards....

10. With respect to this last statement, the Form A-4 states on its face that a declarant may obtain the information necessary to the completion of the Form either from personal knowledge *or* inquiries made. In *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444, attached to the submissions of the objecting employees, the Board had occasion to review the nature of the requisite inquiries, stating:

23. In this case, McKay, the Form 9 declarant, had no personal knowledge of any of the facts material to his declaration. He obtained all of his information in that regard from White. White had personal knowledge of the membership evidence he had himself collected and passed that on to McKay, together with information he received from Savard about the cards and money collected by Savard and Schwartz. This may not be an ideal way for a Form 9 declarant to inform her/himself. But it is acceptable. There is no suggestion in the evidence that any of McKay, White, or Schwartz conducted themselves improperly or that anyone in the chain passed on incorrect information. On the contrary, we are satisfied that, on the evidence before the Board, McKay made reasonable and sufficient inquiries for the purpose of making the Form 9 declaration and we therefore decline to reject it.

11. In the above case, the Board was faced with an allegation, which was ultimately found to be proven, that one employee had not paid dues or fees on his own behalf.

12. Since *Radio Shack* and *Can Eng Metal*, the Board's forms have been amended to reflect changes in the governing statute. There is no longer any requirement to attest to the collection of

dues or initiation fees or the identity of the collector. Form A-4 now requires its declarant to attest to the fact that the documents submitted in support of the application and which represent membership evidence on behalf of persons who were employees of the responding party in the bargaining unit on the application date, *were signed by those employees*.

13. In the case before us, just as in *Radio Shack*, there are no facts alleged which, if proven, would cause the Board to find that the statements attested to therein are false.

14. As the Board noted in *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223, the practice of not allowing a respondent employer to inspect membership evidence filed in support of an application for certification is more than a policy of the Board, it is enshrined in the provisions of section 113 of the *Labour Relations Act*. Although the legislation does permit the Board discretion to disclose this evidence, as the Board stated in *Grand & Toy Limited*, “given the primacy of the secrecy of such evidence, that discretion must be exercised only for compelling reasons in circumstances where such disclosure would further the purposes of the Act”.

15. It is reasonably clear that if the Board were to permit a broad-ranging inquiry into the circumstances of the completion of the Form A-4 and the nature of the inquiries made, it will be very difficult to maintain the secrecy of the membership evidence. The baring of details as to the collection of the membership evidence, the persons who were involved, the time and place and the other persons present leads inevitably to the direct or indirect identification of union supporters and renders section 113 meaningless. Although there have been and will continue to be cases where such disclosure is necessary, in this case we see no basis for it.

16. At the January 30th hearing, the Board was also required to rule on the admissibility of certain evidence which the objecting employees proposed to lead. This evidence related to three employees, Dhanraj Singh, Gary Doobay and Doug Hinks. Although some of the particulars of this proposed evidence were disclosed to the union on January 30th, it was not until the morning of January 31st, when this evidence was to commence, that the names of these three individuals were made known to the union and further particulars supplied. In essence, the proposed evidence is similar to the evidence which Mr. Lam has given, in the sense that these three individuals are alleged to have signed cards without the ultimate “Witness” present.

17. After hearing the submissions of the parties, the Board ruled, with K. Davies dissenting, to permit the evidence. We did so with some serious reservations as to the timeliness of the disclosure of particulars to the union. As indicated above, the Board first identified the potential issue on which these employees will give evidence on December 14th, inviting the parties to determine whether they would take a position on it. On December 15, counsel agreed to place their positions in writing as soon as possible. Yet only on January 30th and 31st did the union learn of these new allegations, which are related to a pre-existing issue.

18. There is not only an obligation on counsel to disclose particulars of allegations of wrongdoing as soon as they become known to them, there is also an obligation to investigate in a timely way once events become known which may give rise to concern. Having ruled that this evidence is admissible, the Board should not be taken to condone a manner of proceeding with a case where new allegations may be raised which should have been disclosed earlier. The Board should also not be taken to suggest that further allegations may be raised at any point in these proceedings. Each issue will be determined as it arises.

19. In determining that this evidence is admissible, the Board considered the fact that the new particulars are not significantly different from those that are already before the Board. In a general way, therefore, the union has known about the nature of the issue and has had an opportu-

nity to canvass it with the persons involved. Further, the Board found it unlikely that there would be any significant delay in proceeding with this case, even after providing the union with an opportunity to investigate these new particulars.

20. The Board therefore ruled the evidence admissible, although it declined to hear the evidence on this day, so that the union could have time to prepare to meet these new allegations.

4174-93-R La Co-opérative De Point-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais, Applicants v. United Food and Commercial Workers International Union, Local 278W, and The United Brotherhood of Carpenters and Joiners of America - Local 3054, Responding Parties v. United Co-operative of Ontario and UCO Petroleum Inc., Intervenors v. Group of Employees, Objectors

Constitutional Law - Sale of a Business - Related Employer - Whether labour relations of applicant falling within federal or provincial jurisdiction - Applicant engaged in farm input and grain merchandising business - Board not persuaded that operation of grain elevators, silos, retail store and other operations at particular site sufficiently integrated into operation of feed mill and feed warehouse situated there so as to be to be subject to federal regulation - Work of employees at other sites not sufficiently integrated with operation of various federal works situated there to fall within federal jurisdiction - Board concluding that it has constitutional jurisdiction to hear merits of application

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *Theodore Crljenica* and *Charles Desmarais* for the applicants; *Caroline Cohen* and *John Hammond* for the United Food and Commercial Workers International Union, Local 278W; *Mike McCreary* and *Ken Fenwick* for the United Brotherhood of Carpenters and Joiners of America - Local 3054; no one appearing for the United Co-operative of Ontario; no one appearing for the UCO Petroleum Inc.

DECISION OF ROMAN STOYKEWYCH, VICE-CHAIR AND BOARD MEMBER, H. PEACOCK; February 3, 1995

1. This is an application brought under the provisions of sections 1(4) and 64 of the *Labour Relations Act*.

2. La Co-opérative De Pointe-Aux-Roches (referred to by the parties and in this decision as "Stoney Point Co-op") is a co-operative incorporated pursuant to the provisions of the *Co-operative Corporations Act*, R.S.O. 1990 c. 35. Since 1947, the Stoney Point Co-op has been in the business of what was characterized as "supplying farm inputs and services" as well as merchandising grain at a number of locations in the County of Essex. The applicants (also referred to collectively in this decision as "the employer") Stoney Point Co-op, 1015195 Ontario Limited and Charles Desmarais claim that they stand in the relation of common employer as contemplated under section 1(4) of the Act. They also claim that as a result of certain transactions jointly effected by them, and in particular, the purchase of the assets of a number of farm co-operatives, a sale of a business within the meaning of section 64 of the Act has transpired. The applicants further

claim that, as a result of the intermingling of the employees of the purchased co-operatives (who up to the present time have been represented by the responding party trade unions) with those of its existing operations (who are not represented by a trade union), the Board should terminate the bargaining rights of the respondents, or in the alternative, order that a vote be held pursuant to the provisions of section 64(8) of the Act to determine the wishes of the applicants' employees.

3. In response to the application, the responding party trade unions both raise the constitutional objection that the Board lacks jurisdiction to adjudicate upon this matter because the applicants' business is engaged in the operation of "works... for the general advantage of Canada" declared pursuant to the provisions of section 92(10)(c) of the *Constitution Act*. More particularly, it is the position of the respondents that the employees of the businesses that are the subject matter of this application are employed on or in connection with feed mills, feed warehouses, and seed cleaning mills that fall within the scope of the declaration in section 76 of the *Canada Wheat Board Act*, R.S.C. 1985, c. C- 24. Therefore, it is submitted, the labour relations of the applicants, in whole or in relevant part, are subject to the provisions of the *Canada Labour Code* R.S.C. 1985, C. L-2 and not to those of the Ontario *Labour Relations Act*.

4. In a decision of a differently constituted panel of the Board dated May 19, 1994, the parties were directed to provide in writing their positions and particulars of their evidence with respect to the constitutional issue and that this matter be heard on July 19 and 20, 1994. At the hearing, the parties were able to agree upon all material facts relevant to the constitutional issue, and argument proceeded on the basis of an agreed statement of fact as supplemented by certain documentary evidence and the submissions of counsel. The following is the Board's determination with respect to the constitutional issue before it.

I

5. Before proceeding to the evidence, it is useful to review the statutory and constitutional provisions that are at issue in this aspect of the proceeding. Section 92 (10) of the *Constitution Act, 1867* provides as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,-

• • •

10. Local Works or Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

(b) Lines of Steam Ships between the Province and any British or Foreign Country;

(c) Such Works as, although wholly situate within the Province, are before or after the Execution declared by the Parliament of Canada to be for the general advantage of Canada or for the Advantage of Two or more of the Provinces.

6. Pursuant to its powers under section 92(10)(c), the federal Parliament has declared that, among other things, feed mills, feed warehouses and seed cleaning mills, are "works ... for the general advantage of Canada". Section 76 of the *Canada Wheat Board Act* provides as follows:

76. For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore con-

structed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada and, without limiting the generality of the foregoing, every mill or warehouse mentioned or described in the schedule is a work for the general advantage of Canada.

7. The effect of a declaration pursuant to section 92(10)(c) of the *Constitution Act* is to bring the matter of the operation of “works” that are otherwise within the legislative jurisdiction of the provinces into that of the federal Parliament. The validity, in general terms, of the declaration found in section 76 of the *Canada Wheat Board Act* has been affirmed on numerous occasions by the Courts (*Jorgenson v. A. G. Canada*, [1971] S.C.R. 725; *The Queen v. Thumlert* (1959), 20 D.L.R. (2d) 335; *Chamney v. The Queen* (1973), [1975] 2 S.C.R. 151; *Re Shur Gain Division, Canada Packers Inc. and National Automobile, Aerospace and Agricultural Workers Union of Canada (C.A.W.-Canada)* (1991), 85 D.L.R. (4th) 317 (F.C.A.) and was not contested by the parties to the present proceeding. Similarly, consistent with this Board’s finding in *W.G. Thompson & Sons Limited*, [1987] OLRB Rep. May 787, it was agreed by all the parties that the several feed mills, feed warehouses and seed cleaning mills on the sites now operated by the applicants were caught by its terms.

8. At issue in the present application is the effect that the presence of these works (which, as will be seen, form only a portion of the applicants’ business) has upon the constitutional status of its labour relations, and more particularly, with respect to the labour relations of those operations recently incorporated into the applicants’ business. It was the position of the responding party trade unions that the various operations of the applicants at these locations, which would otherwise fall within the provincial jurisdiction, were so integrated into the operations of the federally declared works located there (and which it characterized as “core federal undertakings”) so as to render the entirety of those operations within the jurisdiction of the federal Parliament. For that reason, it was contended, this Board has no jurisdiction to hear the merits of this application. It should be noted that the employer, although agreeing that the feed mills, feed warehouses and seed cleaning mills on its premises were “affected” by the declaration in section 76 of the *Canada Wheat Board Act*, and although it participated fully in the presentation of the evidence and argument in this proceeding, nonetheless declined to take any position with respect to what further effect the operation of the works subject to the declaration might have upon our jurisdiction with respect to its labour relations.

9. Finally, it is to be noted that earlier in these proceedings, the responding parties took the position that the various grain elevators on the applicants’ operations were also subject to the declaration pursuant to the *Canada Grains Act* (and referred to in section 76 of the *Canada Wheat Board Act*). However, having had the opportunity to further review the applicable statutory provisions, at the hearing it was agreed by both the applicants and the responding parties that the declaration had no application to the grain elevators on the applicants’ premises and that position was withdrawn. Accordingly, subject to the responding parties’ position that the grain elevators were integrated in the operation of the federal works, it was agreed that labour relations with respect to the grain elevators fell within the provincial jurisdiction and that the only types of “works” directly affected by the declaration were the feed mill, feed warehouses and the seed cleaning mills.

II

Stoney Point Co-op Prior to Alleged Sale

10. As indicated, the Stoney Point Co-op has been engaged in the farm input and grain merchandising business for many years. The business entails the operation of grain elevators, the sale and application of fertilizer and pesticides, the sale of farm seed, farm feed, hardware supply

and bulk petroleum. In general, the co-operative provides a broad range of products and services required by farmers for the operation of farms in the Essex County area, although a portion of its bulk petroleum business is also related to the supply of industrial customers in the nearby Windsor area. Prior to the events in 1993 that, it is claimed, gave rise to a common employer relationship and the sale of a business, the co-operative operated out of three locations in Essex County: its main location at Stoney Point, Ontario, and smaller operations in nearby Belle River and Rochester Township, Ontario. As noted above, none of the employees of the Stoney Point Co-op prior to the transactions which gave rise to the present application were represented by a trade union.

11. The Stoney Point, Ontario location consists of a complex of grain elevators and silos, offices, a workshop, a farm supply retail store, a bulk petroleum plant, pesticide warehouse, blender and fertilizer warehouse. None of these facilities are subject to the declaration under section 76 of the *Canada Wheat Board Act*, and in themselves, would not be subject to federal jurisdiction. However, also present on the Stoney Point location is a seed cleaning mill, in which seed is cleaned, sorted and bagged, and a warehouse in which the bagged seed and animal feed is stored. It was agreed by all concerned that the seed mill and the feed warehouse would be affected by the declaration in section 76. The Board was directed to the evidence that the financial transactions relating to the sale of seed and feed, as well as those related to petroleum sales and distribution, fertilizer and grain sales, and the sale of sundry retail items all either took place in the retail store or are electronically linked to a centralized accounting system operating out of the Stoney Point administrative offices, where the sale or credit is recorded. There are no administrative or operational distinctions drawn between sales of seed, on the one hand, and of the remaining products and services, on the other, and it would appear that the sales of both categories of transactions would be conducted by the same personnel. Similarly, employees working in the seed cleaning aspects of the employer's operations would also work in the other areas.

12. The Board was provided with little direct evidence as to the proportion of sales or other commercial activity that are attributable to the seed mill and feed warehouse aspects of the Stoney Point location. Nevertheless, from our review of the evidence regarding the physical description of the location, and from the evidence relating to the activities of the persons employed at the Stoney Point location, we are satisfied that the seed mill and feed warehouse constitute a relatively minor part of the business at Stoney Point. Thus, of the approximately thirty employees working at or out of the Stoney Point location, only one employee is assigned on a regular basis to the seed mill and warehouse operations, although other employees may be assigned to such work on an as needed basis. By contrast, six full-time office employees are engaged in the administrative aspects of the business (which, it appears, may include the regulation of certain aspects of the seed mill operation), eight employees are engaged in the sales and delivery of bulk petroleum, and fourteen employees are primarily engaged in the operations of the other aspects of the Stoney Point location that are not subject to the declaration.

13. The evidence discloses that the applicants' operations at Belle River, Ontario also include a designated federal work, i.e., a warehouse in which feed is stored and from which feed is sold. However, as in the Stoney Point location, the warehouse appears to be a relatively minor aspect of a complex that, in itself, would be a provincially-regulated operation. Thus, in addition to the warehouse facility, the Belle River location consists of a gas bar, convenience store, car wash and garden centre. It appears that, as in the Stoney Point facility, the transactions relating to the feed warehouse are performed in the retail store, alongside the transactions relating to the other aspects of the business. However, once again, the Board was not provided any direct evidence with respect to the proportion of commercial activity represented by the feed warehouse at the Belle River location although from all the circumstances, it would appear to be very minor indeed. In particular, it is noteworthy that of the 18 employees engaged at the complex, no employee was

assigned primarily to work in or in connection with the warehouse. By contrast, 6 persons were employed on a full-time basis as sales clerks in the store, while 12 part-time employees attended at the gas bar and car wash.

14. Finally, the Co-op's Rochester Township location consists only of a single grain elevator, employing two persons who are deployed from the Stoney Point location. All parties conceded that the grain elevator does not fall within the scope of the declaration in section 76 of the *Canada Wheat Board Act*. However, because the Rochester location was a branch of the Stoney Point operation, and administratively linked with that operation, it was submitted that, it too, was closely integrated into the overall operation.

Transactions Effected by 1015195 Ontario Limited

i.) Harrow Farmers Co-operative Association Limited

15. The applicant 1015195 Ontario Limited ("101") is a corporation incorporated under the laws of the Province of Ontario, and is owned solely by the Stoney Point Co-op. 101 was incorporated for the purpose of the purchase of the assets of other farm co-operatives in the Essex County area with an eye to the commercial integration into their overall operation of the Stoney Point Co-op.

16. Pursuant to this mandate, in May, 1993, 101 purchased the assets of the Harrow Farmers Co-operative Association Limited ("Harrow Co-op"). Prior to the transactions at issue in this application, the Harrow Co-op had carried on its business, which was similar in nature to that of Stoney Point Co-op, at two locations in Essex county, those being at the Town of Harrow and at McGregor, Ontario. The employees at the Harrow and McGregor locations were represented by the responding party United Brotherhood of Carpenters and Joiners of America ("Carpenters").

17. The Harrow location consists of a feed mill, a feed warehouse, two grain elevators, numerous grain silos, a petroleum depot, and a retail store with an adjacent chemical vault and machine shop. These facilities have been at this location since approximately 1960. Previously, the area used as a chemical vault was used to house a seed cleaning operation. However, that operation was destroyed in a fire in 1989 and was not used for seed cleaning purposes at any time relevant to this application.

18. There are two elevators and ten silos at the Harrow location which receive wheat, corn and beans from local farmers. The evidence indicates that farmers would drive their wagons to dump their grain in the grain elevators. From there, the grains would be transferred to the nearby silos for storage. The evidence concerning the use of the grain stored in the silos, and in particular, the proportion of the grain utilized in the feed mill operations is extremely unsatisfactory: thus, the statement of facts relates only that "some" of the grain received is used in production of feed at the mill. The remainder of the grain is sold and shipped to Windsor for use or transport elsewhere. Farmers would receive payment for their product brought to the elevator at the nearby store.

19. The feed mill at Harrow is a plant in which grain is processed into various animal feeds, and then bagged for sale. The feeds are produced by blending and mixing wheat, oats, cracked corn, soybean meal and other ingredients. Once blended and bagged, the feed is stored in the adjacent warehouse. The scale of operations of the feed mill appears to be relatively modest: approximately three to four tonnes per week of the feed is sold and transported elsewhere, including to the Stoney Point location; the remaining two to three tonnes per week are sold on location to farmers.

20. Farmers purchase the feed by going to the nearby store, where, as noted previously, transactions relating to the sale of grain, petroleum and other retail items are also effected. At the store, a customer's order is recorded, payment is made, and the feed is then loaded by employees at the feed warehouse or is picked up by the farmer directly at the mill. However, the sale of feeds constitutes only a portion of the total sales by the store. Especially during the spring months, the sale of seed, fertilizers, chemicals and pesticides accounts for a large majority of the sales. In the remaining months of the year, approximately 40% of the sales relate to feed, although there is no indication in the evidence what proportion of those sales are with respect to feed actually produced at the Harrow mill. Similarly, there was no evidence to indicate what overall proportion of the store's annual sales were attributable to the sale of feed, although given the above figures, and the submissions of counsel to the effect that sales would be particularly brisk during the spring months, it would appear to be substantially less than half. Finally, adjacent to the store is a gas bar operated on a year-round basis. All commercial transactions with respect to the gas bar were conducted at the store. Once again, no evidence was forwarded with respect to the proportion of store sales attributable to the gas bar.

21. At the time the Stoney Point Co-op took over operation of the facility, there were six persons employed at the Harrow location. Only one person was assigned specifically to the feed mill, although another employee appears to have worked there regularly. In addition, it appears that a number of the employees would work in the feed warehouse on an as needed basis.

22. The McGregor location has been operated as a branch of the Harrow operations for many years. It consists of a grain elevator, seven silos, a warehouse in which feed is stored, and a store at which the feed is sold. The warehouse and the store occupy one building. The warehouse is used to store livestock feed such as "chicken-feed". All the feed is obtained from the Harrow location, and consists both of feed that is processed at the Harrow location as well as that processed elsewhere. However, there was no evidence as to the proportion of the feed warehoused at McGregor that is produced at Harrow. The feed is sold to farmers in the surrounding area. All financial transactions with respect to the sale of feed are conducted in the store. With the exception of such items as dog and cat foods, animal feed is the only product normally sold at the McGregor store.

23. The elevator at the McGregor location receives wheat, corn and soya beans from farmers in the surrounding area. Local farmers drive their trucks to the elevator and deposit their grain there. The grain is then moved up through the elevator by a conveyor and then augured to one of the seven silos. Farmers store grain there and wait for the price to increase or, if the price is satisfactory at the time, sell it directly to the Co-op. Farmers are charged a fee for the storage. There was no evidence presented to us with respect to the ultimate destination of the grain stored at McGregor.

24. There is only one employee assigned to work at the McGregor location, although during the busy times of the year, he may be assisted by an employee sent from the Harrow location. Once again, the evidence is sparse as to the relative commercial significance of the feed aspect of the operation at McGregor. However, the evidence does indicate the grain purchasing element of the operation to be substantial, and occupies the majority of the sole employee's working time.

ii.) United Co-operatives of Ontario

25. In December, 1993, 101 purchased the assets of an additional four farm service centres that had to that time been owned and operated by the United Co-operatives of Ontario ("U.C.O."). These facilities were located at Cottam, Oldcastle, Kingsville and Comber, Ontario. With the exception of the Comber location, whose operations were not affected by the bargaining

rights of any trade union, the employees engaged in the work at these facilities were subject to a collective agreement between the U.C.O. and the responding party United Food and Commercial Workers International Union.

26. The Cottam site is a complex that consists of a wide range of facilities including a farm supply retail store, grain elevators and silos, a merchandise warehouse, a fertilizer depot, a bulk petroleum storage depot, a workshop, a bulk chemical storage shed, and administrative offices. In addition there is a seed cleaning mill and a feed warehouse adjacent to the retail store. Little evidence was presented with respect to the relative commercial significance of the seed cleaning and feed warehousing aspects of the Cottam operation, although from the description of the various facilities and activities at the site, they would appear to be very minor indeed. The work on the seed cleaner is seasonal, lasting approximately for a month in the spring and a month in the fall. During these times, the seed cleaning facility was characterized as “busy”, although there was no other evidence as to the overall significance of the activity.

27. Otherwise, there appeared to be a considerable amount of activity at the Cottam site. In addition to the retail sale of a wide range of farm implements and input products, the employees at Cottam are engaged in the sale and distribution of bulk petroleum, the purchase and storage of grain, as well as the sale and custom application of fertilizer and pesticides for farms. In support of the responding parties’ position that the operation of the seed cleaner and feed warehouse was integrated into the operation of the remainder of the operations at Cottam, it was pointed out that financial transactions regarding seed and feed were conducted inside the store in which other articles (including seed produced and bagged elsewhere) are purchased, that the same scales used to purchase and sell grain was used to weigh the cleaned and bagged seed, and that the feed warehouse is situated adjacent to the retail store. Finally, the evidence was that although only “some” of the employees would be primarily responsible for the work at the seed cleaning operation, other employees would assist them on an as needed basis. Nevertheless, there was no evidence with respect to the overall proportion of time spent on work related to seed cleaning or feed warehousing, whether on an individual or group basis. The Board notes, however, that of the six employees assigned to the Cottam site, none of them is assigned primarily to perform seed cleaning duties.

28. The Arner, Ontario location operates as a branch facility of the Cottam, Ontario operation. None of the parties asserted that there were any federally declared works on the site. The location consists of a grain elevator and nearby silos, where local farmers bring grain to be graded and stored. There is a small office where invoices are issued to the farmers and other minor administrative matters relating to the sale and storage of the grain are performed. Employees from the Cottam site are assigned to work at the Arner location on an as needed basis.

29. The Comber, Ontario location consists of a country elevator located next to railway tracks. There are no employees assigned to the Comber location, and they are assigned from the Stoney Point site on an as needed basis. There was no evidence with respect to the regularity of the work at this location.

30. The facility at Kingsville, Ontario consists of a retail store complex, that features a green house, a lawn and garden centre, a fertilizer warehouse, a blender where fertilizer is mixed, a pesticide warehouse and a gas bar. In addition, on the site there is a feed warehouse, whose product is sold at the retail store. The evidence indicates that the five employees at the site perform a wide range of duties, including those related to the warehouse, on an as needed basis. However, none of the employees works primarily in the feed warehouse, nor is there any evidence with respect to the relative commercial significance of the feed warehouse aspect of the operation.

However, bearing in mind the various other facilities present at the site, the feed warehouse would appear to be a relatively minor aspect of the operations at the Kingsville site.

31. The circumstances of the Oldcastle location are similar to those at Kingsville. The portions of the Oldcastle location purchased from U.C.O. in December, 1993, similarly consists of a retail farm input store with a wide range of supplies. Its facilities include a greenhouse, lawn and garden centre, fertilizer warehouse, grain silos and an administrative office. In addition, there exists on the site a feed and seed warehouse, whose contents are sold at the retail store. No employee is assigned to perform work primarily in the feed warehouse, although any of the eight employees may work there on an as-needed basis. The Board was provided with no evidence as to the regularity of the work performed there, nor was there any evidence as to the relative commercial significance of the feed elements of the operation. Finally, there was nothing in the materials before us to let us determine whether feed storage, rather than seed storage, was the primary use of the warehouse building. Under all of the circumstances, it is safe to assume that the feed warehousing operates, at the highest, as one among many other aspects of the business at Kingsville and constitutes a relatively minor aspect of its overall operations.

iii.) Integration of Operations after the Transactions

32. Subsequent to the sales, a number of the operations of the various facilities were consolidated into the structure of the Stoney Point Co-op. Primarily, this entailed a centralization and consolidation of the administrative operations of the Co-op, as well as the rationalization of the sale and distribution of bulk petroleum products and the pesticide services offered by the various facilities. Thus, the evidence indicates that the electronic accounting system operating in the pre-sale Stoney Point Co-op was now extended to the locations purchased from Harrow and U.C.O., such that the commercial transactions effected at each of the locations in the system are now recorded in the centralized accounting system. This, of course, would include the sale of feed processed at the Harrow feed mill and the seed milled at the other locations and the purchase of the products related to the operation of those facilities.

33. In addition, the evidence indicates that the Stoney Point Co-op entered into a joint venture agreement with a corporation formerly controlled by the Harrow Co-op to facilitate the sale and distribution of petroleum products throughout the area that is serviced by the now-enlarged operations. Otherwise, there appears to have been little effort to further co-ordinate any activities related to the elements of the operations that are directly affected by the declaration. It should be noted in this regard that the product of the Harrow feed mill continues to be distributed to other locations for sale in the new Stoney Point system, although the evidence does not disclose the proportion of the product that is so distributed, nor does it indicate the proportion of feed sold in the co-op system that originates at the Harrow mill.

III

34. Having regard to this evidence, it was the position of the responding party trade unions that the Board lacks jurisdiction to adjudicate upon this matter because the labour relations of the co-ops allegedly purchased by the applicants fall within the federal domain. Relying upon the recent decisions of the Supreme Court of Canada in *Ontario Hydro v. Ontario Labour Relations Board et al.*, [1993] 3 S.C.R. 327, [1993] OLRB Rep. Oct. 1071 and *Bell Canada v. Quebec (Commission de la sante et de la securite du travail)*, [1988] 1 S.C.R. 749, it was argued that the operation of any of the federally declared "works" on the sites necessarily entailed the existence of a "federal undertaking" there. Accordingly, it was submitted that, at the very least, the employment relationship of those persons working on or directly in connection with those works would fall within the scope of the provisions of the *Canada Labour Code*.

35. Nevertheless, it was recognized that a finding to that effect would not in itself oust this Board's jurisdiction to hear the present application since the substantial majority of the relevant operations fell outside the scope of the federal declaration in the *Canada Wheat Board Act*. To this end, it was argued further that, in the context of the Stoney Point Co-op, the operation of the feed mill, the seed cleaning mills and the various feed warehouses constituted "core federal undertakings" that operated in a relationship of sufficient integration with the remaining aspects of the locations so as to also bring them within federal jurisdiction. Counsel referred us to numerous authorities, both of this Board, and of the Courts, to support this position, including *Reference re Industrial Relations and Disputes Act*, [1955] S.C.R. 529, *Montcalm Construction Inc. v. Minimum Wage Commission et al.*, [1979] 1 S.C.R. 754, *C.S.P. Foods Ltd. and Canada Labour Relations Board et al.* [1979] 2 F.C. 23, *Canadian Communications Structures Inc.*, [1992] OLRB Rep. July 777.

36. It is to be noted that although in their pleadings both responding parties took the position that the entirety of the applicants' operations were within the federal jurisdiction, that argument was not advanced by the responding parties at the hearing. Instead, it was the thrust of their submissions that the operation of those portions of the now enlarged Co-op that had previously been operated by Harrow and U.C.O. were the proper subject matter of the present inquiry and their submissions focused exclusively upon the integration of what were asserted to be the "core federal undertakings" with the "subsidiary" elements of the operations present at those sites.

37. On behalf of the employer, it was argued that the "core-subsidiary" analysis proposed by the trade unions was not appropriate in circumstances where there was, as in the present case, only one integrated undertaking present. Instead, it submitted, the initial task for the Board was the constitutional characterization of the undertaking, which the applicant equated with the integrated business operations of the Stoney Point Co-op in its entirety. Although as noted above, the employer declined to take a position on the constitutional question, it was submitted, among other things, that it was open for the Board to find that the presence of an integrated federal aspect in that undertaking was sufficient to render the labour relations of the applicants federal in their entirety. In support of that proposition, counsel relied upon *Attorney-General for Ontario and Others v. Winner et al.*, [1955] A.C. 541 (P.C.), *Toronto v. Bell Telephone Co.* [1905] A.C. 52, and *Transit Windsor*, [1993] OLRB Rep. July 698.

38. Counsel fairly conceded that the application of this principle appeared to be restricted to "transportation and communication cases", (and thus, with respect to "works" and "undertakings" that are federal by virtue of the provisions of sections 92(10)(a) and (b) of the *Constitution Act*). It was nonetheless submitted that an approach in which the constitutional character of the business taken in its entirety was appropriate in the context of the present constitutional issue and was urged upon us. However, when the source of the federal power that is being exercised in the present circumstances is taken into account, i.e., the declaration only of "works" under section 92(10)(c), we cannot agree that an analysis of the undertaking as a whole is the appropriate starting point in determining its scope. It is important to note that in the caselaw referred to us by counsel, and in cases such as *Re Ottawa-Carleton Regional Transit Commission* (1983), 44 O.R. (2d) 560 (Ont. C.A.) the Courts' inquiry into the "essential nature of the undertaking" in question is consistent with the provision of the *Constitution Act* that deems "undertakings" that connect the Provinces to be within the federal jurisdiction. It follows from such an inquiry that the *entire* undertaking falls within the federal jurisdiction even if only a tiny fraction of the overall operation of the business is so engaged (*Re Ottawa-Carleton, supra*). The inquiry in the present case, however, is of a fundamentally different sort since the basis upon which federal jurisdiction is claimed is not with respect to the "undertaking", but with respect to "works". Especially in light of the recent decision of the Supreme Court of Canada in *Ontario Hydro, supra*, in which the scope and

nature of the federal declaratory power over “works” was exhaustively analyzed, it is clear that the approach most consistent with the character of the federal power being asserted under section 92(10)(c) consists of the identification and determination of the scope of operation of the “works” that are affected by the declaration.

39. In *Ontario Hydro, supra*, the Court considered the effect of the exercise of the federal declaratory power over nuclear facilities upon the labour relations associated with the operation of those facilities. Although the issue of the precise dividing line between the jurisdictions was not directly before the Court, and although the majority of the Court did not speak with a single voice, the Court nevertheless articulated principles that are germane to the issue before this Board. All members of the Court, including those joining in the dissenting opinion of Iacobucci J., were in agreement that, for the purpose of determining the scope of the federal power under section 92(10)(c), it is necessary to characterize the “works” not merely as a physical entity, but in the functional sense, having regard to the “integrated activities carried out therein.” (citing *Laskin’s Constitutional Law* (5th Edition, 1986), vol. 1, p. 629). Further, although they did so for differing reasons, a majority of the Court determined that the scope of the federal power was not restricted to “the physical shell” of the works, but their operations necessarily entailed (*per* LaForrest J.), or entailed on a *prima facie* basis (*per* Lamer C.J.C.), the labour relations of persons employed on or in connection with the federal works.

40. While it was suggested at the hearing that, on those grounds, it was appropriate to consider the entirety of the Stoney Point Co-op as an integrated undertaking for purposes of characterization of the federal power, we cannot agree that *Ontario Hydro, supra*, stands for the proposition that there remains no operative distinction between “works” and “undertakings” and that, therefore, whether it is the works or the undertaking that are declared should be a matter of indifference to us. To be sure, in *Ontario Hydro*, a majority of the Court rejected the notion that because the declaratory powers under section 92(10)(c) extend only to the “works” and not to the “undertaking” (as is the case in the powers accorded to the federal Parliament under section 92(10)(a) and (b)), the provincial character of labour relations related to such “works” would not be affected by a declaration pursuant to that provision. That is to say, the Court held that “works” can have labour relations associated with them. Nonetheless, although the Court rejected the works/undertaking distinction for that purpose, both the plurality holding of LaForrest J. and the concurring decision of Lamer C.J.C. make it clear that the scope of the declaratory power over works extends only so far as is necessary to give effect to the federal power being extended into what was previously the provincial domain, and only so far as it is necessary to give that power operational meaning. In this respect, both majority holdings determine that federal authority over labour relations extend only with respect to employees engaged “on or in connection with” the nuclear operations of Ontario Hydro and that the non-nuclear aspects of the Ontario Hydro undertaking would not be affected by the federal declaratory power.

41. While the plurality decision of LaForrest J. declines to enter into the question of the methods to be used in the course of determining the scope of federal authority in this respect, the decision of the Chief Justice makes it clear that the principles applicable to circumstances in which there are federally declared works operating in the context of a provincially regulated enterprise are those utilized by the Courts and labour relations tribunals in determining whether the work of employees is integrated into a “core federal undertaking”:

The special problems raised by such divided activities within a single enterprise were canvassed by this Court in *Northern Telecom Canada Ltd. v. Communications Workers of Canada*, [1983] 1 S.C.R. 733. Most of Northern Telecom’s employees were subject to provincial labour law. However, some employees were “installers”, who installed telephone equipment in Bell Canada’s telephone network. The Canada Labour Relations Board determined that the instal-

lers were not employed on or in connection with the federal enterprise that was Bell Canada, and who were outside its jurisdiction. This Court held that the installers were sufficiently integrated into the operations of Bell Canada to fall within federal labour relations jurisdiction. Writing for a majority of this Court, Estey J. described the inquiry before the Court, as it had been outlined by Dickson J. (as he then was) in an earlier incarnation of the litigation (*Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115). Dickson J. wrote (at p. 133):

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that undertaking. Once that is settled, it is necessary to look at the particular subsidiary operation, i.e., the installation department of Telecom, to look at the “normal and habitual activities” of that department as a “going concern”, and the practical and functional relationship of those activities to the core federal undertaking.

42. Having regard to those principles, the Chief Justice found that the “normal and habitual activities” of persons employed in the course of the production of nuclear energy at Ontario Hydro’s nuclear facilities was integrated into the operation of the federally declared works such that their labour relations were subject to federal regulation. However, the scope of operations of the federal works was narrowly defined and the term “on or in connection with” given a restrictive meaning. Indeed, the opinion of the Chief Justice appears to rest upon the lack of integration of the two functions, noting that “[o]nce the heat energy is produced, it matters little how it was produced for the rest of the generation phase.”

43. To summarize to this point, then, in determining the scope of the federal power under section 92(10)(c), it is necessary to look at the “works” in question in an operational sense. At least on a *prima facie* basis, the federal power extends to the regulation of labour relations of persons engaged “on or in connection with” the operation of the federal works so understood. Because it is the “works”, rather than the “undertaking” that are subject to the declaration, the scope of the federal power extends only so far as is necessary to effect the operation of the federal purpose set out in the declaration, and does not necessarily extend to the entire business in which the federal works operate. In circumstances (such as the present ones) in which there are federal works operating in the context of a business that is otherwise engaged in provincially-regulated activities, the appropriate method for determining the scope of the federal authority is the analysis traditionally used by the courts to determine whether the work activity entailed in operations subsidiary to a federal undertaking are “integrated” into the activities of that federal undertaking. (See also *Eugene Kalwa*, [1994] OLRB Rep. Mar. 277, where this Board, on the basis of considerations expressed above, found that the work of an inspector of nuclear facilities was in connection with the federally declared works.)

IV

44. Because the core/subsidiary analysis referred to in the *Ontario Hydro, supra*, decision requires application to a considerably different factual context in the present application (where the issue is the degree of integration of the applicants’ various operations with the feed mill, feed warehouses and seed cleaning mills), it is useful to review it in more detail. The general principles underlying this question are well-established and have been articulated in a number of decisions of the Courts and labour relations boards. In *Northern Telecom Ltd. v. Communications Workers of Canada et al* (“*Northern Telecom I*”), [1980] 1 S.C.R. 115 Dickson J. summarized the relevant principles in the following manner:

(1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.

(2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.

(3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.

(4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service, or business is a federal one.

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, one must look at the normal and habitual activities of the business as those of a "going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity.

45. In determining the scope of the federal authority over labour relations, the courts have embarked upon an operational or functional inquiry in order to ensure that the constitutional provisions granting power to the federal government are given effect, while at the same time respecting the claims to provincial competence over the subject matter of labour relations. (*Montcalm Construction Inc. v. Minimum Wage Commission*, *supra*; *Ontario Hydro*, *supra*.) In this respect, the Courts have not permitted the niceties of corporate organization or proprietary claims to be determinative of whether the labour relations of an undertaking are subject to the federal jurisdiction. Rather, the focus of the inquiry has been upon the relationship between the services rendered by the employees in question and the operation of the federal works or undertaking in order to determine, whether in practical terms, those works are part of the federal undertaking. (*Northern Telecom No. 2*, *supra*, *per* Estey J.) Accordingly, just as the presence of federal works in a business will render its labour relations federal only to the extent necessary to achieve the federal objective set out in the declaration, (*Ontario Hydro*, *supra*.) the mere fact that a business has no corporate ties to a federal undertaking does not preclude it from also falling under federal jurisdiction if its operations are integrated into those of an undertaking operating federal works. (*Northern Telecom No. 2*, *supra*.)

46. The analytical approach that has been generally adopted in this respect is most usefully summarized in *Arrow Transfer Company, Ltd.*, 74 CLLC 16,130, a decision of the British Columbia Labour Relations Board that has received considerable judicial approval:

They [the Courts] begin with the operation which is at the core of the federal undertaking (e.g. railway, shipping, or the postal service). They then look at the particular subsidiary operation engaged in by the employees whose collective bargaining is in question and reach a judgment about the relationship of that operation to the basic federal undertaking. The judges have used a variety of terms to characterize the part the particular operation may play in the over-all enterprise. It must have a "vital", "essential", "integral", "important", or "intimate" role in the undertaking if it is to fall within the jurisdiction of Parliament. As was said earlier, that has been the conclusion about the relationship of stevedoring to shipping and of mail pick-up to the postal service; the opposite conclusion was reached regarding the relationship of a hotel to the railroad. In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on the technical, legal niceties of the corporate structure of the employment relationship.

47. The cases demonstrate that the extent or degree of integration of the function performed with that of a federal undertaking necessary to oust provincial jurisdiction is necessarily

high since, as noted, the real issue is whether, as a matter of fact, the work of the employees of the subsidiary operation is a functional part of the federal operation or undertaking. Thus, in finding that stevedoring work, which would otherwise fall within the provincial jurisdiction was federal in nature, the Supreme Court in *Reference re Validity of Industrial Relations and Disputes Act (Can.)* (“*Stevedores’ Case*”), *supra*, concluded that it was “an integral part” of and “necessarily incidental to” the work of interprovincial shipping (per Estey J.) and that the shipping operations were “entirely dependent upon the services of the stevedores of the Company” (per Taschereau J). To similar effect, in *Northern Telecom No. 2*, *supra*, in finding that the labour relations of installers of certain telephone equipment were federally regulated, the Supreme Court noted the “almost complete integration of the day to day function” of those installers (who were employees of a company that was otherwise provincially regulated) with the operation of the telecommunications network owned by Bell Canada, a federal undertaking. It is to be noted that the functional relationship between the federal undertaking and the subsidiary operation was extremely close: indeed, in Estey J.’s characterization, it was a “very close, tightly scheduled integration of the services performed by the installers and the acceptance of those services by the employees of Bell into the telecommunications network without interruption of the performance of the network at any time”. In short, the work of the installers was seen as an inherent part of the work processes engaged in by the federally regulated business. (See also *Canadian Communications Structures Inc.*, *supra*.)

48. Conversely, in *Canadian Pacific Railway Company and A.G. for B.C. et al.*, [1950] A.C. 122 (J.C.P.C.), the court found the operation of the Empress Hotel in Victoria not to be sufficiently integrated into the operations of the railway undertaking notwithstanding that both the railway and the hotel were owned and operated by the same company. In characterizing the operation of the hotel as a “convenience” associated with the federal undertaking, the court made it clear that an element of functional or operational necessity must be present in the relationship between the subsidiary operation and the federal undertaking before the provincial jurisdiction would be displaced. This requirement has also been expressed in terms of a temporal analysis of the work process, in which the construction of an airport was characterized as being merely “preliminary” to the operation of the federal work and therefore remaining within the provincial jurisdiction. (*Monicalm Construction Inc.*, *supra*.) In this respect, it appears that the Courts, in assessing the character of the connection between the two entities, will embark upon an examination of whether the work of the subsidiary operation is, by its very nature, in some way inherent in, or essential to, the operation of the core federal undertaking.

49. This point was recently underscored in *Central Western Railway Corporation v. United Transportation Union et al.*, [1990] 3 S.C.R. 1112, the most recent decision of the Supreme Court of Canada in which the question of the requisite degree of integration of a subsidiary operation into a federal works or undertaking was examined. In that case, the Court found that the operation of a branch-line railway, which served no other purpose than the delivery of grain from elevators to the main CN track, was nonetheless insufficiently integrated into the operations of either of those federal operations so as to fall within the federal jurisdiction. The requirement of operational necessity, which was articulated by Dickson C.J.C. as the “dependence” of the federal undertaking upon the operations of the subsidiary, was expressed with particular clarity with respect to the railway’s connection with the grain elevators:

... the elevators are not dependent upon the continued operation of Central Western. Elevators exist to receive, grade, handle and store grain but are not directly concerned with the transportation of grain. Grain could be transported from the elevators by alternative means, such as trucking, without altering the usefulness of the elevators along the line. There is thus an insufficient nexus between the grain elevators and Central Western to bring the railway within federal jurisdiction. (*per* Dickson C.J.C., p. 1143)

50. Finally, in addition to considering the nature of the function being performed, the Courts have considered the integration of the work into the federal operation in quantitative terms. As was noted in the *Ontario Hydro, supra*, decision, the Courts will look to the “normal and habitual” nature of the activity in question and in this respect, will disregard the casual or exceptional performance of duties, even if they are integral to the operation of the federal undertaking. Thus, in *Northern Telecom No. 2, supra*, the Court stressed not only the nature of the functions of the installers, but also paid considerable attention to the fact that the employees concerned spent almost all of their time performing that function. Underlying this principle is an essentially practical concern: were casual and exceptional factors allowed to come into play in the course of the determination of who has legislative competence over a person’s employment, “the Constitution could not be applied with any degree of continuity and regularity.” (*Northern Telecom No. 1, supra.*)

V

51. It is with these considerations in mind that we turn our attention to the responding parties’ assertion that the operations of the entirety of the applicants’ business at the purchased sites are, for constitutional purposes, integrated into the operation of its feed mill, seed cleaner and feed warehouses.

52. Turning first to the Harrow site, the presence there of both a feed mill and a feed warehouse clearly marks that location as the highwater mark of “federal” activity. Only one employee is assigned to work on the feed mill on a regular basis, and it operates with significant degree of functional interrelationships only with the nearby grain elevators and silos and retail store. With respect to the grain facilities, it is clear that although the silos and elevators are useful for the operation of the feed mill, they are not essential or necessary to the operation of such a facility in the sense articulated in the jurisprudence. It was conceded by counsel in argument that it would be possible to operate the feed mill without the use of the extensive storage facilities present at the site: the grain used in the production process could be supplied to the mill by means of any number of other instrumentalities and in fact, farmers occasionally bring their grain directly to the mill to have it processed there on a “whil-U-wait” basis. In that respect, the grain elevators and silos are analogous to the branch line railway in the *Central Western* case, *supra*, which, although performing an important supply function with respect to two federal undertakings, was nonetheless not performing an operationally necessary one because that function was not inherent to the operation of the mill and could, in any event, be performed by other means.

53. It is noteworthy in this respect that the numerous silos and elevators present at the Harrow site operate for the primary purpose of engaging in the provincially-regulated grain trade, and its function of supplying grain to the mill appears to be its secondary function. We note in particular that the evidence indicates that only “some” of the grain stored in the silos and elevators is stored for use in the mill, and thus, we are satisfied that even if storage facilities of some kind were a requisite part of the production process, the character of the particular storage facilities present at the Harrow site are not functionally necessary to effect that operational purpose.

54. Finally, the evidence does not compel us to conclude that the work in the grain elevators and silos constitutes an inherent part of the production process at the mill, which we take to be the processing of grains and other materials into animal feeds (see *Shur Gain, supra.*) From our review of the materials before us, we are satisfied that to the extent that the work can be characterized as related to the operation of the federal operation, it is preliminary to the work involved in the processing of feed and in that respect, is analogous to the construction of an airport. In sum, we are satisfied that the grain elevators and silos on the Harrow site are not an integral part of the

feed mill operations situated there, but are, at most, a convenient adjunct to it. Accordingly, we find that work on or in connection with the grain storage facilities on the Harrow site is not subject to federal regulation.

55. More difficult is the question of the work involved in the operation of the retail store at Harrow since in that case, the evidence is clear that feed produced at the mill or stored at the adjacent warehouse is sold there. Moreover, there is some authority for the proposition that the work involved in the sale of the product of feed mills is integral to its operation. (See in particular, *C.S.P. Foods, supra*; but, cf. *Regina v. Saskatchewan Wheat Pool* (1978), 89 D.L.R. (3d) 755 (Sask. C.A.)) However, upon careful consideration of all the circumstances, we are not satisfied that the work in the retail store at the Harrow site can be characterized as “normal and habitual activities” in relation to the operation of the federal works. It is important to note that the store at the site performs a wide variety of functions, only one of which is the sale of feed. Further, it is clear that the sale and storage of feed is not a principal aspect of the overall operation of the store and thus, of the employees working there. Assuming, without deciding, that the sale of feed from the Harrow mill constitutes a function that is integral to the operation of the mill, we are not satisfied that the work of employees at the store entails a sufficiently regular connection to the operation of the mill to warrant a finding that their labour relations fall within the ambit of federal regulation.

56. In *Northern Telecom No. 2, supra*, despite the evidence that virtually all the employees’ work was closely integrated into the work processes of the federal undertaking, the Court felt compelled to comment that, nonetheless, the decision fell “close to the line”. Similarly, in coming to the conclusion that the work involving the sale of feed products was subject to federal jurisdiction, the court in *C.S.P. Foods, supra*, found that the sale of feed products was a “substantial” part of the operation in question. In the present circumstances, the Board infers that the work in the store would only occasionally involve the employees in feed sales, and even then, it is unclear as to whether the transactions would be with respect to feed produced at the Harrow mill or stored at its warehouses. Similarly, although employees at the store may on occasion be requested to perform functions in the feed mill, this is clearly on a casual, “as needed” basis. Conversely, we find it likely that the predominant part of the work at the store would involve activity altogether unrelated to the operation of the feed mill and feed warehouse, such as recording transactions regarding grain (which, as we have found above, are not functionally integrated into the operation of the feed mill), facilitating the sale of products in the retail store, making arrangements with respect to the sale of petroleum products, and servicing the gas bar. On balance, we are satisfied that the work, so characterized, falls significantly short of the line drawn in the *Northern Telecom* decision, and accordingly, we find that work in connection with the operation of the store not to be “normal and habitual” activity related to the operation of the feed mill and feed warehouse at the Harrow site.

57. Having so found, work at the remaining aspects of the Harrow site can be dealt with summarily, particularly since counsel for the responding parties conceded that the claim to their being within the federal jurisdiction rested upon their connection with the operation of the store. Even were the work in the store to be part of the operation of the federal work, we were provided no authority for the kind of constitutional leapfrogging proposed by the responding party. The work entailed in the operation of the bulk petroleum depot, the administrative offices, the chemical vault and the machine shop cannot under any test formulated by the Courts or this Board be seen as integrated into the operation of the feed mill or the feed warehouse. Indeed, that work exhibits a rather fortuitous connection with the operation of the feed mill and warehouse such that it is difficult to characterize its relationship even as one of operational convenience. Accordingly, the Board has no hesitation in concluding that their operation does not attract federal regulation.

58. The work entailed in the operation of the sites formerly owned by the U.C.O., that is, the facilities at Cottam, Arner, Oldcastle, and Kingsville is similar in nature to that at the Harrow store in the sense that a portion of it could entail functions that are in connection with the operation of a federal work. Even more so than at Harrow, however, it is clear that the warehousing of feed and its subsequent sale, as well as the operation of the seed cleaning mill is but one operation among many others engaged in by the employees of what are essentially rural department stores. The businesses operating at each of the sites offer a wide range of products and services, ranging from pesticide sales and application to retail lawn and garden centres to bulk petroleum sales, that have, at the highest, a tangential connection to the operation of the "federal undertakings" in question.

59. In quantitative terms, the evidence does not suggest that the federal elements of the operations are anything but a minor component of the overall operation of the sites. Although the evidence regarding the actual work of the employees is left for the Board to surmise, what is clear is that none of the employees engaged at these sites work primarily in direct connection with the seed cleaning mills or feed warehousing operations. We note that, to the extent that the other employees are requested to work on the seed cleaning operations, it is on a seasonal and casual basis, and therefore the work cannot be considered part of their "normal and habitual" activities. Furthermore, it would appear most probable in all of the circumstances that employees working in the retail operations would spend only a small portion of their time actually engaged in work related to the operation of the feed warehouses. Bearing this in mind, we conclude that the work entailed in the operation of these retail facilities, although occasionally entailing work that we are prepared to assume is integral to the operation of the federal works, nonetheless cannot be fairly characterized as work in connection with a federal undertaking as it is understood in the jurisprudence. Accordingly, we are satisfied that the work at these stores also does not attract federal regulation and is therefore subject to the provisions of the Ontario Act.

VI

60. To summarize, we have not been persuaded by the responding party trade unions that the operation of the grain elevators, silos, retail store and other operations at the Harrow site are sufficiently integrated into the operation of the feed mill and feed warehouse situated there so as to be subject to regulation by the federal Parliament. Similarly, we have concluded that the work of employees engaged in the operation of the sites at Cottam, Arner, Oldcastle, and Kingsville is insufficiently integrated with the operation of the various federal works situated there to fall within the federal jurisdiction. Having so determined, it is apparent to us that the labour relations of a substantial bulk of the operations of the applicants at the locations it purchased in 1993 are subject to regulation by the Province of Ontario, and that consequently, this Board is cloaked with jurisdiction to proceed with the merits of the present application.

61. We note that no party took the position at the hearing that the overall operations of the applicants were subject to federal jurisdiction, nor that its operations at the Stoney Point and Belle River locations were subject to federal regulation. Accordingly, although there would appear to be little material difference between the relationship of the federal works to the remainder of the operations situated there with the circumstances that obtain at Harrow, we decline to make any ruling with respect to that issue.

62. Finally, we make no determination at this point in the proceedings with respect to our jurisdiction over labour relations of the remaining aspects of the applicants' operations (namely, the work of the employee assigned to operate the feed mill at the Harrow location, and of the employee engaged at the McGregor location). Given that we have already ruled that we have juris-

diction to hear the merits of this application, a ruling as to the constitutional status of their labour relations would be unnecessary and gratuitous.

63. In conclusion, for the reasons expressed above, we are not persuaded that the responding parties' objection to our constitutional authority to hear the merits of the present application are well-founded and are satisfied that we have jurisdiction to hear the matter.

64. The matter is referred to the Registrar for scheduling of the merits of the application.

DECISION OF BOARD MEMBER J. A. RUNDLE; February 3, 1995

1. I dissent from the position taken by the majority in this award. I would have upheld the trade unions' position that the applicants business is engaged in the operation of "works... for the general advantage of Canada", declared pursuant to the provisions of section 93(10)(c) of the *Constitution Act*.

2. The respondent trade unions' argument supporting their position for federal jurisdiction focused on the relationship between the retail stores and the federal declared works (the feed, and seed mills and warehouses) at the various branches of Stony Point. The trade unions' argument, which I support, was essentially that because the stores were sufficiently integrated with the federal works, the stores themselves then were under federal jurisdiction. It would then flow that the other operations at the various sites (gas bars and garden centres) were also under federal jurisdiction because they were integrated with the retail stores. The majority of the Board in its award pointed out that the test for federal jurisdiction focuses on the degree of integration between the subsidiary operation and the federal undertaking. The majority found that there had to be "normal and habitual" integrated activity between the retail stores and the federal works in order to fall within federal jurisdiction. The majority found that this level of integration did not exist between the stores and the federal works. In its analysis the majority used the Harrow operation as representative of all the stores at Stony Point. The majority found that the work in the store very infrequently involved feed sales and that the predominate part of the work at the store involved activity unrelated to the feed mill and warehouse. Further, that the portion of the stores annual revenues attributable to the sale of feed appeared to be less than half. As a result of these findings the majority found the interactions between the store and the declared works did not meet the threshold of "normal and habitual".

3. The two federal works at the Harrow site, the feed mill and a feed warehouse as well as the retail store, grain silos, the petroleum depot, chemical vault and the machine shop all comprise integral parts of *one business*. Indeed *all* these components are run as one integrated business at Harrow. The majority, in my respectful submission, has to view the Harrow operation as one business, not as a series of individual components. All the components including the federal works comprise one business which is how the operation has always functioned and which was the evidence before us. The evidence discloses that there are two federal works at the Harrow site, a feed mill and a feed warehouse. All transactions related to the sale of grain at Harrow take place, naturally, at the store. One employee was specifically assigned to the feed mill and a number of employees worked in the feed warehouse on an "as needed basis". Clearly the work force of the "business" comprised the pool of employees from whom individuals were drawn to work in the various components of the business, including the feed mill and feed warehouse. In my view this common staffing of the federal works and the other components creates a high degree of integration between these components. The majority found that there were no employees assigned exclusively to the feed warehouse; instead a "number" of the employees would work in the feed warehouse on an "as needed basis". (paragraph 21) It therefore seems evident that employees move

freely between the two departments and are responsible for duties in both. This common staffing, with employees moving back and forth between these two areas performing duties in both suggest a high degree of integration.

4. The activities of the retail store as they relate to the feed mill and feed warehouse are actually quite substantial and do constitute “normal and habitual activity”. The majority found that feed sales during the spring months were “particularly brisk” and that “in the remaining months of the year approximately 40% of the sales were related to feed”. (See paragraph 20 of the award) With respect, the feed sales represent a significant portion of the store’s activity, and that as an activity, account for 40% of sales for eight months of the year and account for brisk sales for the remaining four months. Therefore this can only represent a “normal and habitual” component of the store’s total activity. The test for constitutional jurisdiction has often been characterized as a factual one, that not surprisingly turns on the particular circumstances of each case. In *Northern Telecom Ltd. v. Communication Workers of Canada*, [1980] 1 S.C.R. 115 (*Northern Telecom N.1*), the court stated at page 133 that the analysis:

“is a functional practical one about the factual character of the ongoing undertaking”.

In *Central Western Railway Corporation v. United Transportation Union et al*, [1990] 3 S.C.R. 1112 at page 1140, the court affirmed that the test for jurisdiction:

“should be flexible and attentive to the facts of each particular case”.

The application of the jurisdiction test requires an evaluation of particular circumstances within a particular context, and not the application of mechanical formulas. It is an exercise of judgement on the part of the adjudicator. The majority found that, activity that constitutes approximately 40% of annual sales, does not meet the required threshold. However the test requires a judgement call, not that specific criteria be applied. There is, with respect, no “magic number”, no specific criteria that must be met. While the majority found that 40% of sales did not represent a sufficient amount of activity, there is nothing special about the figure of 40%; I would argue that 40% is actually sufficient to warrant federal jurisdiction.

5. The majority justification for its finding relies on the quantity of the store’s time and revenue that relates to the feed mill and feed warehouse. With respect, a quantitative analysis is inappropriate in determining jurisdiction. Case law in the transportation area has indicated that even a limited amount of work related to a federal undertaking can trigger federal jurisdiction. Findings of federal jurisdiction have been made when only 3% of a transit system’s total yearly working hours were extra provincial. (*Transit Windsor*, OLRB Rep. July 1993 at 698), or where only 1% of a bus chartering company’s total revenues were from extra provincial charters (*Charterways Transportation Limited*, [1993] OLRB Rep. Nov. 1125). And in *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al*, (1983) 44 O.R. (2d) (C.A.) at 560, the municipal transit system was found to be under federal jurisdiction because 2-4% of its operations extended from Ottawa into Hull, Quebec. I acknowledge that the transportation cases may be distinguished from the present case as the test for jurisdiction has traditionally turned on the criteria of “regular and continuous” activity. However, in *Re of Ottawa-Carleton*, the court made a valuable observation regarding the drawbacks in applying a quantitative analysis. At page 570 the court said:

“There are problems inherent in a quantitative approach. For example, the question must always arise, where should the line be drawn in any particular case? Should the critical ratio be 80-20, 90-10, 95-5 or 60-40”?

Even if the *Re Ottawa-Carleton* case is distinguishable because it is a transportation case, the artic-

ulation of the problems created by a quantitative analysis, of where to draw the line are still very relevant. The majority finds that transactions from the feed warehouse that account for approximately 40% is not sufficient to constitute "normal and habitual activity", then what does? And how will it be determined how much is enough. The application of this quantitative analysis by the Board raises, with respect, problems of arbitrariness and lack of predictability.

6. *C.S.P. Foods Ltd. and CLRB et al*, [1979] 2FC 23, supports the principle that the marketing area of a feed related business is integral to its operation. The court found that the marketing office for the Saskatchewan and Manitoba wheat pools was an integral part of a federally regulated grain related business, and therefore came under federal jurisdiction. At page 31 the court said:

"...the marketing of the manufactured product [was] just as essential [a] component of the entire operation as the work of the mill employee who weighs the farmer's rapeseed or who operates the crushing mill".

Clearly the stores in Stoney Point play as critical a role in the Stoney Point business as the marketing office did in *C.S.P. Foods*, and should therefore be under federal jurisdiction.

7. I note that for purposes of this hearing the parties agreed that labour relations with respect to the grain elevators fell within provincial jurisdiction. As it is the Board's usual practice to honour the parties agreement, I do so regardless of my personal views on this particular issue.

8. At paragraph 52, the majority seems to rely on *Central Western Railway Corporation v. United Transportation Union et al*, [1990] 3 S.C.R. 1112 which is the most recent decision of the Supreme Court of Canada in which the question of the requisite degree of integration of a subsidiary operation into a federal works or undertaking was examined, as standing for the proposition that one must examine whether a component of a business might be dispensed with, or "performed by other means". By such reasoning, the presence of a federal works in the integrated business could potentially be ignored. With respect, this case does not stand for the proposition the majority says it does and consequently is of little assistance in determining the case before us. The *Canadian Western Railway* case did *not* involve an integrated business, as this case does. It involved a short railway spur which, on the facts, was clearly a work or undertaking situated entirely within the province of Alberta, and it had no physical or other connection with the CNR, a railway clearly under federal jurisdiction. Absent any other relevant factors, therefore, it was beyond dispute that the railway spur was under provincial jurisdiction. It was contended however, that because the railway spur serviced a number of grain elevators, themselves under federal jurisdiction, this brought the railway spur under federal jurisdiction. The court rejected this proposition, holding that the elevators were not dependent upon the continued operation of the railway spur. The elevators could use any means of transportation, and the fact they chose to use the railway spur did not bring the spur itself under federal jurisdiction.

9. With respect, this case does not stand for the proposition that one can hypothetically dismantle the component parts of an integrated business, in order to determine whether the owner of the business might not have integrated them. The case involved several businesses, not one, and the court simply determined that merely because they were useful to each other did not make them integral parts of each other for constitutional purposes.

10. To accept, as the majority appears to do, that one must theorize about whether the owner of the enterprise might have done things differently, would involve turning a number of constitutional propositions upside down. The entire functional test of jurisdiction requires an analysis

of what the enterprise does, not what it might have done. There is nothing in the *Central Western Railway* case that, in my view, suggests differently.

11. I return to my original proposition that we are dealing with one integrated business enterprise - and the federal works on each site are fully integrated into that business - they are not viewed as a separate independent component - they are part of the total business. As stated earlier it is my position that the stores are under federal jurisdiction therefore the other aspects of the operations on each site are also under federal jurisdiction. All operations on each site are fully integrated into the store's operations. All the financial transactions related to the other aspects of the operation are conducted through the stores. The employees working on each site can be called upon to work in any aspect of the operation including the feed mill or the feed warehouse. If the stores are federal, as I contend they are, then the rest of each site, and the entire Stoney Point operation, must also be federal in order to facilitate viable labour relations. To do otherwise would allow parts of each site to be under different labour relations jurisdiction. One can only begin to imagine the chaos and problems this situation would create. Due to the fact that employees at each site move about from one component to another, they could be moving from provincial to federal jurisdiction every time they walked from the gas bar into the store, or from the garden centre to the feed mill. This kind of split jurisdiction is clearly unacceptable as it would lead to labour relations problems. The court commenting on a similar situation in *Construction Montcalm Inc. v. Minimum Wage Commission et al*, [1979] 1 SCR 754, said at page 776:

“...a worker whose job it is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he pours cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the Constitution was meant to apply in such a disintegrating fashion”.

The stores, in my respectful submission, are within federal jurisdiction therefore the rest of the operations at each site are also within federal jurisdiction. To do otherwise, would result in labour relations chaos. The court did allow split jurisdiction in *Ontario Hydro v. Ontario Labour Relations Board et al*, [1993] 3 SCR 327, but that case is clearly distinguishable. The operation at *Ontario Hydro* dealt with relatively discrete, separate divisions within the entire corporate entity; the nuclear and non-nuclear divisions. There was no evidence of the sort of employee interchange, similar to what we have here. In the Stoney Point operations there are no such separate departments, and because of the small scale of the business, and the movement of personnel within the different operations, it would be impossible to create the divisions upon which *Ontario Hydro* relies. As a factual matter, the Court proceeded upon the assumption that the federal and provincial works were severable for constitutional purposes, that is not the case here.

12. At paragraph 38 and following, the majority appear to read the *Ontario Hydro* case as standing for the proposition that there is a fundamental distinction between the treatment of “undertakings” and “works” for constitutional purposes. With respect, I do not agree that such a distinction, if it exists at all, has the impact the majority appears to believe it has, nor do I believe it compels a different result in this case. I believe this case highlights the futility of attempting to limit federal jurisdiction only to particular “works” while extending jurisdiction to the rest of the business. This is particularly so, where as here, the federal works are integrated into one business. As I indicated, the court in *Ontario Hydro* proceeded on the assumption that the federal works and the rest of the business were severable for constitutional purposes, and that a dividing line could be drawn between persons employed in connection with the federal works and persons who are not. Such a dividing line cannot be drawn here. To allow mixed federal and provincial jurisdiction over one integrated business will, in my view, do nothing but produce confusion and uncertainty.

13. The majority declined to make any determination as to the jurisdiction that would apply to the feed mill at Harrow and the McGregor location. With respect, the work at these two sites is clearly federal and to not so find would split the Stoney Point operation between federal and provincial jurisdiction which would lead to the same serious labour relations concerns mentioned earlier.

14. In conclusion, I would have found that the Stoney Point sites including the feed mill at Harrow and the McGregor location fell within federal legislation for labour relations purposes. As a result the Board has no jurisdiction to adjudicate the section 1(4) and 64 application.

1989-91-G United Brotherhood of Carpenters and Joiners of America Local Union 785, Applicant v. Robertson Yates Corporation Limited, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor

Construction Industry - Construction Industry Grievance - Damages - Jurisdictional Dispute - Parties - Remedies - Carpenters' union seeking damages in section 126 application, following finding by Board in earlier jurisdictional dispute complaint that its members ought to have been assigned certain work - Board denying Labourers' union standing to participate in hearing of section 126 application - Board applying decision in *Sayers & Associates* and holding that damages should be restricted to circumstances in which Board concludes that contractor/employer did not act reasonably, not those circumstances in which employer reasonably was wrong - Union not demonstrating that employer acted unreasonably and Board concluding that damages not warranted - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

APPEARANCES: *N. L. Jesin* and *J. Gross* for the applicant; *Walter Thornton* and *Jim Thompson* for the responding party; *John Moszynski* and *Tony Cornacchia* for the intervenor.

DECISION OF THE BOARD; February 9, 1995

1. This is an application filed pursuant to the provisions of section 126 of the *Labour Relations Act*.

2. The grievance alleges a breach of the "sub-contracting" clause of the collective agreement between Carpenters, Local 785 and Robertson Yates Corporation Limited ("RYCO"). This application was earlier deferred to a jurisdictional dispute (Board File No. 3183-91-JD), and the Board issued a decision in that matter on October 14, 1994, in which it directed that "RYCO shall assign to the Carpenters all fabrication, installation and dismantling of bulkheads in Board Area No. 6 in the ICI sector."

3. Since the work in question had not in fact been performed by carpenters pursuant to their collective agreement with RYCO, the instant section 126 application was brought back on for consideration, with the Carpenters claiming damages for the breach of their agreement.

4. The Board is asked to consider in what circumstances it will award damages in a section

126 application, consequent upon a finding in a jurisdictional dispute that the grieving union should have received the work but did not.

5. At the commencement of the hearing, the Labourers appeared and sought standing. The Labourers had originally performed the work in dispute. They had participated in the jurisdictional dispute, and now sought standing in this application, in order to address whether the agreement had been breached, and if so, the issue of damages.

6. The Board orally ruled that standing would not be granted to the Labourers. In the Board's view, the Labourers had no right to participate. As the Board had already determined the correct assignment in the jurisdictional complaint, the matter was now a collective agreement issue, solely between the parties to the collective agreement. The Labourers are neither a party to nor bound by the collective agreement in question. Further, given the full participation of RYCO in this application, and the position that RYCO was apparently taking (that no damages should be awarded), it did not appear likely that the Labourers' participation would assist the Board in any meaningful respect. Accordingly, the Board ruled that the Labourers would not be granted standing.

7. At that stage, the Labourers withdrew from the proceedings, and the matter continued without their presence.

8. The dispute between the parties is over the issue of whether damages should be awarded. If the Board should conclude that damages are warranted, it is agreed that they are approximately six thousand dollars. The grievance and jurisdictional dispute arose because of a contest over the correct work assignment between two unions, both of which had collective agreements with RYCO, the general contractor. Each agreement requires RYCO to sublet to contractors which have agreements with the Carpenters or the Labourers, as the case may be. RYCO sublet the work to a contractor which only had a collective agreement with the Labourers. RYCO asserts that no damages ought to be awarded by the Board, notwithstanding any technical breach of the collective agreement between it and Carpenters 785. It submits that its subcontract decision was reasonable in the circumstances. The Carpenters ask that damages be awarded, to reflect the Board's decision that the work should have been assigned to carpenters.

9. Some general background is helpful. This is an issue which arises regularly in work assignment disputes between two or more unions. In the construction industry, bargaining rights and work jurisdictions described in collective agreements often do not define exclusive bodies of work. Agreements of two or more unions may encompass specific work, and different agreements may require given work to be assigned to a particular union's members. Both unions may have claims to the work.

10. It is common for a union which claims entitlement to particular work to file a grievance, and thereafter a section 126 application, in order to assert its rights to the particular work, just as it is common for the competing union to assert its claim to the same work. Unless the parties settle, these claims are resolved through a jurisdictional complaint or dispute before this Board. And that is what has occurred here. What has not been so common, however, is the relisting of the section 126 application after the Board has determined the correct assignment, in order for the grieving union to assert a claim for damages in light of the incorrect assignment (as confirmed by the Board through its decision in the jurisdictional dispute).

11. There appears to be only a single decision of the Board on point. In a decision dated August 29, 1994 (unreported, Board File Nos. 0068-91-G, 0122-91-G, 1381-91-G, 1096-93-G, referred to as *Sayers & Associates*), the Board had to consider the circumstances in which damages

would be awarded in a section 126 application, after a jurisdictional complaint direction had been made. This issue was considered by a panel whose members all have a construction background. As this previous decision of the Board has not been reported, we quote extensively from it:

• • •

10. In particular, it would be unwarranted in all of the circumstances of these applications to award damages in the form of compensation for lost wages, or a lost opportunity for the members of Sheet Metal Locals 30 and 392 to earn wages, because the employers had assigned the work to members of the U.A. Locals 46 and 463. The procedural circumstances are set out in paragraphs 3 through 6 of the decision in *Sayers & Associates, supra*, quoted above beginning at page 4 of this decision. The sense of the difficult operational circumstances in which the employers made their assignments to the U.A. locals instead of the Sheet Metal locals can be gained from paragraphs 9 and 10 of the decision in *Sayers & Associates*.

9. Finally, with respect to the applicants' claim that Decision No. 2 revives an unused INA and will have a disrupting effect on established and appropriate practices respecting assignment of the work in dispute. The material before the Board relating to past practice in each of the three Board areas reveals a variable practice amongst the employers bound to collective agreements with both the U.A. and the Sheet Metal Workers. In Board area #8, the dominant practice has been to assign the work in dispute to U.A. Local 46, although a relatively significant amount of work has been assigned to the Sheet Metal Workers Local 30 or on some sort of composite crew basis to both trade[s]. In Board area #11, the assignment practice has favoured assignment to a crew composed of members of U.A. Local 463 and Sheet Metal Workers Local 392, while in Board area #12, it has favoured U.A. Local 463, although there has been some practice of assigning it to a crew composed of its members and those of Local 269.

10. It is not unusual in work assignment complaints to find variable past practice within a Board area. It is less surprising in these complaints because, in each of them, the two trade unions have relied on the INA to claim assignment of work in dispute to their members on the basis that the INA grants them trade jurisdiction over the work. Clearly, both trade union parties to each complaint have acknowledged that the INA covers the work in dispute, but they differ as to which trade gains jurisdiction from its application. Some of the material before the Board shows that difference to have been a significant factor in work assignment disputes between the two trades in Board area #8 in recent years. The significant number of assignments to composite crews in Board areas #8 and #11, and to a lesser extent in Board area #12, relative to the number of exclusive assignments to either a U.A. or Sheet Metal Workers local, also points to the existence of the same dispute at other times in the three Board areas. In the Board's experience, while there might be a number of reasons why composite crews might be used to perform particular work, one of the most common ones is to avoid or resolve work jurisdiction disputes, particularly when the disputing trade unions are bound to a trade agreement and disagree about its interpretation and application to the work.

11. It may be readily inferred from those circumstances that it has not been unusual for employers performing this work in Board Areas 8 and 11 to have assigned it in face of competing claims from the two unions and variable past practice indicators of how the work had been assigned by other employers in the areas. The evidence about how the employers made their assignments to U.A. Locals 46 and 463 and the evidence of area and employer past practice which was before the Board in the work assignment complaints is evidence for these applications by the agreement of the parties. That evidence reveals that English and Mould's assignment of the work was to U.A. Local 46 and was consistent with the dominant past practice in Board area 8; Sayers and Associates' assignment was to crews composed of equal numbers of members of U.A. Local 46 and Sheet Metal Local 30, consistent with Sayers' practice and that of some other employers; and, Stark's assignment was to U.A. Local 463, in keeping with the employer's consistent past practice in Board area 11. *There is no evidence which suggests that any of the assignments was made in an arbitrary manner or without proper consideration of the criteria commonly applied in*

the construction industry when making work assignments. In fact, it may be inferred reasonably from the materials and other evidence before the Board that the employers' assignments were made rationally in the circumstances, even though the Board found in Kora Mechanical Inc., supra, that the proper assignments were to Sheet Metal Locals 30 and 392.

12. Conflicting claims to work jurisdiction are a fact of life for employers in the unionized construction industry, particularly for employers like Sayers and Associates, Stark and English and Mould who are bound, together with the competing trade unions, to provincial agreements and who employ their members. Contractors make work assignment decisions in a variety of situations, such as when they are bidding for work; when pre-job mark-up meetings are held for the purpose of informing the trade unions (and considering their responses) about whose members will perform particular packages of work on a project; and, during the execution of jobs when one trade union perceives that "its work" is being done by members of another trade union.

13. When a conflict arises between trade unions about an employer's assignment of particular work, the employer does not have the luxury of unlimited time in which to consider the relative merits of the competing claims before making the assignment. Therefore, when employers in circumstances such as were present here make their best decision, but on challenge under section 93 of the Act are found to have made the "wrong" assignment, the appropriate remedy is a direction to "correct" the assignment; in other words, direct the employer to assign the work to the members of the trade union which the Board found to have the better claim to the work.

14. That has been the Board's usual remedy in section 93 applications whenever it has concluded that an employer has assigned work to members of one trade union, trade or craft when it should have assigned it to members of another trade union, trade or craft. When that happens to an employer in circumstances like those present with these applications, *where the employer considered the relevant factors and made a reasonable assignment* (albeit one found by this Board to be incorrect), the employer should not then be subject to damages for lost wages because its incorrect assignment has put it in apparent breach of hiring hall, sub-contracting, or other work protection provisions of a collective agreement to which the employer is bound. That would result in the employer having to pay twice for the same work because of a contest between two trade unions over which one's members should do the work, and *in a context where the assignment was reasonably made* and the work in question was covered by both collective agreements.

15. The Board recognizes fully that paying twice for the same work is the natural consequence befalling the employer who attempts to circumvent its collective agreement obligations by hiring outside the hiring hall provisions or subcontracting contrary to the requirements of the agreement and is found in breach of the collective agreement. Such provisions are there to prevent employers from avoiding their obligations to pay the wages, benefits and other terms of a collective agreement. Therefore, *when an employer knowingly or carelessly breaches those protections and, as a result, members of the union lose wages or opportunities to earn wages, damages in the form of compensation for the losses are appropriate* even though the damages represent a second payment for the work done in breach of the collective agreement.

16. *Those are materially different circumstances than where an employer has rationally considered the relative merits of competing claims* for the disputed work, decided that it should be assigned to the members of one disputing union instead of another one, and then later is found by a tribunal, like the Board, which adjudicates such disputes to have made the wrong assignment. In the latter circumstances, it would not be in the long term labour relations and economic interests of construction industry employers, trade unions and their members to require employers to pay twice for work performed during incorrect assignments.

17. The Board is not overlooking the fact that members of the trade union to whom the work should have been assigned, and who were available to do the work, have lost an opportunity to earn wages as a result of the incorrect assignment. It well may seem something of a hollow victory for the "winning" union and its members to be told that the work should have been assigned to them, and then not be redressed for lost wages. However, the successful union and its members do benefit from the precedent setting nature of the award respecting future assignments by that employer of the same kind of work in the same Board area. It also has precedential value respecting other employers when assigning the same work in circumstances which are materially similar.

18. One of the major problems for construction industry unions during the decade or more prior to the recent amendments to section 93 of the Act and the Board's Rules of Procedure applicable to work assignment disputes has been the substantial length of time it has usually taken to hear and decide an application. It was rare, if ever, that an application was decided before the disputed work was completed. Therefore, when a union succeeded in having a work assignment changed in favour of its members, they did not get to do the work on the project where the dispute had arisen. This situation has been improved substantially because of the expedited procedures currently available under the Act and the Board's Rules of Procedure applicable to work assignment complaints. The Board is responding quickly in resolving work jurisdiction disputes brought under that section. This means that parties to timely applications can expect normally to get a resolution to a dispute while the work is still being performed. Therefore, if the Board alters an assignment, there will be work for the beneficiaries of the assignment to perform. Therefore, when the Board decides to correct an employer's assignment, a Board direction that the employer forthwith make the correct assignment is the appropriate way to remedy the "incorrect" assignment. Conversely, it would be an inappropriate remedy and not in the best interests of labour relations in the construction industry to award damages under a grievance which alleges that the employer's "incorrect" assignment had resulted in breaches of the collective agreement of the "winning" trade union.

19. That is not to say, however, that there could be no circumstances in which damages in the form of compensation for lost wages and/or relief in the form of cease and desist and other declarations would be appropriate remedies where an employer makes an incorrect assignment. *Such remedies might well be appropriate where an employer acts arbitrarily in making an assignment, or disregards established area practice, and/or ignores or fails to properly consider other commonly accepted criteria for making work assignments, and is found to have breached a collective agreement because of the incorrect assignment.*

20. It was for these reasons that the Board, in exercising its arbitral discretion to fashion remedies, including an award of damages in the form of compensation for lost wages, concluded that it would not grant the remedies sought in the four applications even were the Board to assume, without finding, that the employer in each instance had breached the provincial agreement between the Sheet Metal Workers' International Association and the Sheet Metal Workers' International Association Ontario Sheet Metal Workers' Conference and the Ontario Sheet Metal and Air Handling Group to which they and Sheet Metal Locals 30 and 392 are bound. In the result, these applications are dismissed.

21. Before concluding these matters, the Board is constrained to make some observations. It is conventional wisdom in the unionized construction industry in Ontario that, when a union successfully challenges an employer's work assignment before a tribunal established to decide such matters, and the employer corrects the assignment pursuant to a direction of a tribunal established to decide such matters, the successful union does not then seek damages by means of a grievance alleging breaches of its collective agreement binding on the employer arising out of the incorrect assignment. The Board is unaware of any instance where, after it has directed an employer to alter a work assignment, the trade union which gained the assignment for its members made a successful claim for damages or any other remedy, or even where it has filed or pursued a grievance under section 126 of the Act, other than these applications. Nor did any of the parties refer the Board to any specific or general authority supporting an award of damages or other remedies in a grievance pursued after a successful challenge to a work assignment.

[emphasis added]

12. As the emphasized portions illustrate, the Board in *Sayers & Associates* described the approach in numerous ways, but to the same general effect. Unless there is evidence which suggests that the employer made the assignments in an arbitrary or otherwise unreasonable fashion, damages will not be a remedy granted by the Board in the arbitration proceedings.

13. The applicant questions whether this approach is appropriate. Even if the Board follows *Sayers*, the applicant suggests three reasons why damages should nevertheless be awarded here. First, the applicant asserts that the Board ought not require the union to establish exceptional cir-

cumstances in order to obtain damages. Rather, the Board ought to conclude that damages usually would flow, absent an affirmative demonstration by the employer that it acted reasonably in all the circumstances. Thus, the applicant submits, even on the test articulated by the Board in *Sayers*, the onus ought to be upon the employer to establish why damages ought not to be awarded.

14. Second, the applicant argues that to conclude otherwise would amount to denial of jurisdiction, for the Board would be establishing a general rule by which it declined to award damages even though there had been a breach of the collective agreement.

15. Third, on the particular facts, the applicant asserts that the employer did act unreasonably in not ensuring that the work was performed by members of Carpenters, Local 785. In this regard, the applicant relies upon Article 19 of the Provincial Collective Agreement, which sets up a scheme for the establishment of local area work practice.

16. Pursuant to Article 19.02, “the determination of established local area work practice under 19.01 will be placed before a committee for decision ... A subsequent assignment in violation of a committee’s decision shall be considered a violation of this Agreement and subject to grievance and arbitration.” Carpenters Local 785 relies upon a particular local area work practice which was determined pursuant to the provisions of Article 19.01 and 19.02, and which, in the Carpenters’ submissions, made clear that Carpenters’ were entitled to the work here.

17. Specifically, the Carpenters rely upon the clauses in the local area work practice which indicate that the following should be exclusively assigned to its members:

1. Job site fabrication of forms to receive concrete.
2. Installation of all forms to receive concrete.
- ...
12. The building and setting of all bulkheads and centres.
- ...

18. There was a clear and unambiguous practice that bulkheads ought to be assigned to members of the Carpenters in the Board Area in question, and there was a local area practice which had been established under the mechanism for this in the collective agreement. In the face of this, submit the Carpenters, RYCO acted unreasonably in subbing the work to a sub-contractor which had no contractual relationship with the Carpenters.

Decision

19. We agree with the approach taken by the Board in *Sayers & Associates*. As a general proposition, where the general contractor or employer is bound to conflicting collective agreements, each containing an obligation to sub-let the work to employers with a contractual relationship with the union (or some equivalent or analogous requirement), absent a demonstration by the grieving union that the general contractor or employer acted unreasonably in all the circumstances, the Board will not likely grant any damages by way of remedy in the section 126 application.

20. Unlike the long, expensive, and convoluted practice that previously existed, the current jurisdictional dispute process at the Board is relatively quick and efficient. Parties are required to file their jurisdictional dispute materials quickly, and the Board convenes a consultation shortly thereafter. In many cases, parties can obtain a decision from the Board before the work has com-

menced, or before it has been completed. Unions will often be able to obtain a work assignment direction fast enough to still recover actual work for their members.

21. This will not always be possible. There will be occasions where the Board's decision in the jurisdictional dispute is given after the work is completed. Even then, there is good reason not to routinely award damages for the incorrect assignment.

22. The purpose of the jurisdictional dispute provisions, to which a section 126 application of this nature is an adjunct, is to determine the correct work assignment, in a context in which the unions and the assigning contractor or employer have legitimate and reasonable dispute over the appropriate assignment. The Board is therefore called upon to exercise its powers under section 93 and to determine the "correct" assignment. The process is designed to provide the parties with a quick answer, where there may be well-founded but competing claims to what is "correct", claims not amenable to resolution under section 126 of the Act, but claims needing Board intervention. It would be counterproductive to thereafter penalize contractors or employers who made reasonable assignments in the particular circumstances, even if those assignments nevertheless turned out to be "incorrect".

23. Jurisdictional complaints, and related section 126 applications, should together comprise a mechanism that will reduce the incidence of work assignment disputes and the delays and obstructions to construction in the province. If damages were awarded for assignments reasonably made, the ability of contractors and unions to inexpensively resolve assignment disputes amongst themselves would be seriously impeded.

24. While there is an initial attraction to the view that a breach of the collective agreement involving the use of non-members of the union, that occurs because of an incorrect assignment to another union, ought to result in a remedy that includes damages, this approach misconceives the character of the dispute, and its tripartite nature. This analysis rests upon the assumption that entitlement to work flows from the union's craft status or specific language in the collective agreement, neither of which is strictly true.

25. The reality is that contractors and employers are regularly bound to collective agreements with different trades, each of which cover work of a particular sort, binding the contractors or employers to assign particular work to both unions. The requirements are often irreconcilable. And the reality is that these collective agreements are negotiated in a context where the bargaining parties are fully aware of this when the agreements are settled. The parties are under no apprehension that the granting of subcontracting protection in these areas of overlap of work jurisdiction will necessarily guarantee a union the work. They both realize that there may still be valid claims to the work by competing unions.

26. Ultimately, it is the work assignment decision that determines which union is entitled to the work. It is not ordinarily the collective agreement which secures the work, regardless of its clauses. Damages ought not to flow, therefore, simply because the assignment was made contrary to a particular clause in the collective agreement.

27. Contractors or employers must decide which union to use. Often the decision will be clear. Equally, because of the nature of the industry, and the changing practice in it over the years, assignment decisions can be difficult. There may only be fine distinctions justifying one assignment over the other, and very plausible reasons for either.

28. Damages should be restricted to those circumstances in which the Board concludes that

a contractor/employer did not act reasonably, not those circumstances in which an employer reasonably was wrong.

29. And there will no doubt be occasions when the Board might award damages; for example, where an employer wrongfully declines to hold a mark-up meeting, where the employer assigns contrary to generally accepted practice or to Board decisions indicating the correct methodology or assignment, or when the Board is not satisfied the assignment was made in a bona fide manner or for a bona fide purpose. This does not purport to be an exhaustive list.

30. The materials filed in a jurisdictional complaint generally set out the process by which the work came to be assigned. These materials usually describe the factors considered by the contractor/employer in assigning as it did. These facts are rarely in dispute. Unions which wish to establish, in the section 126 application, that contractors/employers acted unreasonably in their assignment will therefore commonly have knowledge of what took place, and will be able to focus on any aspects of the process or result they allege to be deficient.

31. If the contractor/employer must prove reasonableness in every section 126 application, there will likely be litigation in most applications. This would be expensive, and unnecessary in a great many cases. If, on the other hand, the union has to demonstrate unreasonableness by the contractor/employer, the only cases litigated will be those where there was some good reason to believe that damages might issue, where the union had some grounds for believing a contractor/employer acted unreasonably. For this reason, we prefer the latter approach.

32. We return now to the Carpenters argument that the local area work practice clearly covers the assignment in question, and demonstrates that RYCO acted unreasonably in the circumstances. In our view, the local area work practice does not establish this.

33. The work here was the fabrication, installation and dismantling of bulkheads that were required for the proper installation of a superflat concrete floor. It is common ground that there is no prior decision of the Board with respect to this type of floor. In its decision in the jurisdictional complaint, the Board did not give particular weight to this local area work practice, since it was a practice not binding upon the competing union, the Labourers'. A local area work practice established under a bipartisan collective agreement, with no input or binding effect upon a competing union, is of limited utility in assisting an employer or contractor in determining the correct assignment, at least where the employer or contractor is bound by competing collective agreement claims for the work. The contractor is still in the same position, bound by irreconcilable collective agreement demands by different unions. The local area work practice does not clarify for the employer or contractor which of two competing unions, with two competing collective agreements, ought to be assigned the work.

34. In the circumstances, the union has not demonstrated that RYCO acted unreasonably, and damages are not warranted.

35. Our decision not to award damages here is not a denial of jurisdiction. In our view, the Board has a general discretion with respect to appropriate remedial relief in section 126 applications. This is a discretion that the Board has exercised for many decades, albeit in other contexts. For example, the Board has considered the timeliness of a section 126 application, and dismissed it where it was brought too late. It has applied the doctrine of estoppel, to conclude that a remedy otherwise appropriate ought not to issue. Similarly here, we have considered it appropriate in the particular circumstances to decline to make an award for damages. At the same time, and as noted above, there will no doubt be circumstances in which damages are appropriate.

36. Finally, if the applicant is correct in its assertion that, as a matter of law, the Board must award damages whenever the Board determines that the correct assignment was to members of the grieving union (and that union's collective agreement requires that its members be used for the work), then the Board would no doubt take this factor into account in the jurisdictional complaint itself. Knowing that overturning an assignment would necessarily mean awarding damages might well lead the Board to decline to interfere with the assignment, to make its decision prospective in effect, or to issue other equitable declaratory relief.

37. For these reasons, this application is dismissed.

0167-94-R; 0442-94-R United Food & Commercial Workers International Union Local 175, Applicant v. **Suedon Foods Ltd.** c.o.b. as Elizabeth Street I.G.A., Responding Party; William Edmonds, Applicant v. United Food & Commercial Workers International Union, Local 175, Responding Party v. Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A., Intervenor

Bargaining Unit - Bargaining Rights - Combination of Bargaining Units - Termination - Timeliness - Petition - Practice and Procedure - Three weeks following union's application to combine existing full-time and part-time bargaining units, employee in full-time unit filing application to terminate bargaining rights in that unit - Board finding it appropriate to consider and determine termination application prior to entertaining union's application to combine bargaining units - Board satisfied that signatures on petition in support of termination application representing voluntary wishes of those who signed - Representation vote directed

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *Cynthia Watson*, *Michael Klug* and *Sharon Gall* on behalf of the United Food & Commercial Workers International Union, Local 175; *John M. Wigle* and *Laurel Downey* on behalf of *William Edmonds*; *John Mastoras*, *Margaret Gavins* and *Wayne Taylor* on behalf of Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A.

DECISION OF ROMAN STOYKEWYCH, VICE-CHAIR, AND BOARD MEMBER, R. M. SLOAN; February 14, 1995

1. Board File No. 0167-94-R is an application pursuant to the provisions of section 7 of the *Labour Relations Act* for the combination of the full-time and part-time bargaining units of employees of Suedon Foods Ltd. c.o.b. as Elizabeth Street I.G.A. (referred in this decision as "the employer" or "Suedon Foods"). On April 15, 1994, the date that the combination application was filed with the Board, the applicant trade union was party to separate collective agreements for the full-time and the part-time staff at Suedon Foods. The terms of both collective agreements set their expiry dates as July 3, 1994.

2. Board File No. 0442-94-R is an application pursuant to the provisions of section 58 of the Act filed with the Board on May 6, 1994. The applicant William Edmonds, a full-time employee at Suedon Foods, seeks a declaration that the trade union no longer represents the employees of the full-time bargaining unit at Suedon Foods. It was common ground between the

parties and we find that, subject to the considerations addressed in this decision, the termination application was filed in a timely manner.

3. The novel issue raised by the timing of the filing of these applications is the question of the appropriate order in which the applications ought to be considered and determined by the Board. This procedural choice entails substantial implications for both applications. Simply put, were the termination application to be considered first and a declaration terminating the union's bargaining rights with respect to the full-time unit to issue, there would, for all practical purposes, cease to be a basis for the trade union's combination application. Conversely, were the combination application to be considered first and an order issue declaring the union to be the bargaining agent for a combined unit of full-time and part-time employees, there would be, at the least, some doubt as to whether the union's bargaining rights could then be defeated by way of an application seeking a termination of its rights only with respect to the "full-time unit". In this respect, it was common ground between the parties that the termination application lacked the requisite numerical support to entitle the applicant to a representation vote were the combined unit to be considered the relevant bargaining unit for purposes of the count.

4. In light of the potentially conflicting claims set out in the two applications, by decision of a differently constituted panel of this Board dated May 24, 1994, the two matters were set for hearing together for the purpose of determining whether either, and if so, which of the applications should be granted procedural priority by the Board. Having heard the parties' submissions with respect to the priority issue at a hearing held on June 6, 1994, the present panel reserved its decision with respect to that matter and proceeded to hear the evidence and submissions relating to the merits of both applications subject, of course, to our determination of the procedural question. It should be noted that although the evidence relating to the termination application was hotly disputed over the course of numerous days of hearing, the parties were able to reduce the evidence relating to the combination application to an agreed statement of fact. The following is our decision with respect to all outstanding issues relating to these matters.

5. The Board is empowered to order the combination of bargaining units by virtue of section 7 of the Act, which provides as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

6. The authority of the Board to terminate the bargaining rights of trade unions in circumstances where there is a collective agreement in effect is described in section 58 of the Act:

58.- (1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at the time that is determined under clause 105(2)(j.1) that they no longer wish to be represented by

the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

(5) Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.

(6) Upon the Board making a declaration under subsection (4) or (5), any collective agreement in operation between the trade union and the employer that is binding upon the employees in the bargaining unit ceases to operate forthwith.

Appropriate Order of Determination of the Applications

7. Both by bringing his application, and in subsequent correspondence to the Board, the applicant in the termination application has raised the objection that the Board's granting of a combination direction as requested by the trade union would significantly affect the rights of the employees in the full-time unit to have the question of their representation determined by the Board. Notwithstanding that the filing of the combination application preceded that of the termination application by some three weeks, Mr. Edmonds requests that the Board defer the consideration of the combination application in order to preserve these representation rights.

8. Having carefully considered the matter, we are of the view that both statutory and broader labour relations considerations militate strongly in favour of granting the termination application procedural priority in the present circumstances. Underlying the detailed statutory provisions relating to the representation provisions of the Act is the clear legislative policy in favour of preserving the two month "open period" for the purpose of bringing representation applications. While it is not particularly helpful to ascribe, in the abstract, a "more fundamental" quality to termination rights than to other rights under the Act when a conflict between such rights is at issue (see *Venture Industries Canada Ltd.*, [1990] OLRB Rep. May 625), it is nonetheless clear that employees' ability periodically to choose whether or not to be represented by a trade union is an interest that has otherwise been scrupulously safeguarded by the provisions of the Act. In light of this, in order to give employees' representation rights practical effect, the Board has in other contexts been careful to structure its discretion in such a manner as to prevent their derogation. (In particular, see *The National Cash Register Co. of Canada, Ltd.*, [1967] OLRB Rep. Apr. 90; *Ridgewood Industries*, [1990] OLRB Rep. Mar. 331.)

9. Furthermore, it is noteworthy that the statute elsewhere makes express provision for procedural priority in circumstances in which applications of a different nature are made concurrently with representation applications. In subsection 105(3) of the Act, the Board is given express power to, among other things, postpone or altogether refuse consideration of a termination application where it is filed prior to the Board having determined other pending applications for certification or termination. To similar effect, by virtue of subsection 41(22) of the Act, the Board has been granted a discretion to decide the order of determination of an otherwise timely termination application filed during the course of a pending application for a direction of settlement of a first contract by arbitration. As well, subsection 41(23) of the Act deems a timely termination application to be of "no effect" when it is filed after first contract arbitration has been initiated. (See, for example, *Northfield Metal Products*, [1990] OLRB Rep. Mar. 302, *Venture Industries*, *supra*.)

10. The Act makes no similar provision with respect to termination applications filed during the course of pending combination applications, and in this respect we cannot agree that the practice of the Board in these other areas is sufficiently analogous to be of assistance to the trade union in its endeavour to have the combination application determined first. If anything, the inference is to the contrary in that the absence of such "priority" provisions with respect to combination applications suggests that it was not the Legislature's intention that the Board's determination of termination applications be affected merely by the filing of a combination application affecting one of the units whose representation rights are put into question.

11. While the union's proposal for granting the combination application priority does not fit well within the framework of labour relations values articulated by the Act, we are, on the other hand, satisfied that an otherwise timely termination application filed prior to the commencement of the Board's deliberations with respect to a combination application is both a factor that the Board may properly consider and, for purposes of establishing procedural priority, a factor of particular relevance. In contrast to the detailed provisions of section 58, the Act sets out little in the way of specific procedure for the determination of combination applications. Provided that the necessary statutory criteria are met, an application for combination of bargaining rights can be filed at any time, and the Act does not prescribe a terminal date for the consideration of evidence. (Cf., sections 8(4) and 58(3) of the Act.) Moreover, the powers that are granted to the Board in respect of combination applications are considerably more open-ended than is the case in termination applications. The Act provides only that the Board "may combine" units upon receipt of an application, and although subsection 7(3) sets out the labour relations considerations that the Board is required to entertain in the course of its determinations, it is nonetheless made clear that it "may take into account such factors as it considers appropriate" in the course of doing so.

12. In our view, the filing of an otherwise timely termination application with respect to one of the units sought to be combined prior to the commencement of hearings with respect to the combination application is a factor of considerable importance to the Board for the purposes of determining whether the making of a combination order is appropriate. The effect of proceeding with the hearing and determination of the combination application without reference to the representation issue would be to significantly abridge, if not to entirely eliminate, the rights of the employees in the full-time unit to seek a declaration terminating the trade union's bargaining rights. In the present circumstances, we see no statutory basis nor compelling labour relations rationale to support such a result.

13. In this respect, we are not satisfied that we would be giving practical effect to the representation rights of the full-time employees were the termination application required to await the outcome of the combination application. More particularly, we find no merit in the argument of union counsel that the statutory rights of the employees would be equally preserved in these circumstances were the Board to consider the bargaining unit sought to be terminated as the proposed combined unit. It is notable that there is a considerable disparity in the size of the two units being sought to be combined, there being approximately seven employees in the full-time unit whereas the unit of part-timers includes approximately 28 employees. On the basis of numbers alone, we do not take this proposal to contain within it an equivalent right. Whatever else might be the case, on May 6, 1994, the date of filing of the termination application, the statutory prerequisites for the Board's processing of the termination application with respect to the full-time unit at Suedon Foods were present. In the absence of any statutory direction or compelling labour relations rationale to the contrary, we are not satisfied that the mere filing of a combination application should cause the Board either to defer its inquiry into the voluntariness of the statement of desire filed by Mr. Edmonds, or to read the provisions of section 58 as subject to the trade union's application.

14. Moreover, we cannot agree that the “first in first out” principle operative in the context of concurrent certification applications (see *The Carleton Board of Education*, [1993] OLRB Rep. Feb. 102), and urged upon us by the trade union, adequately addresses the statutory interests at play in these circumstances. In any event, we have some concerns as to whether the equities of the foot race inherent in “F.I.F.O.” are present where only one of two competing applicants is required to file its application within strict time limits. While we are conscious that the question of whether a combination application is merely pending or actually determined is a matter potentially subject both to the vicissitudes of the litigation process and to the manipulation of interested parties, we are satisfied that in the present circumstances, that concern is unfounded. The period of approximately three weeks between the filing of the two applications is not of the sort in which the trade union could reasonably have expected to have its combination application determined and, in any event, we are satisfied that any delays encountered thereafter affecting the processing of the application by the Board were entirely *bona fide*.

15. Accordingly, having carefully considered the evidence and the submissions of the parties, the statutory provisions relating to the respective applications, and to the labour relations policies inhering in the statutory framework, we are satisfied that it would be appropriate for the Board to consider and to determine the application seeking a declaration of the trade union’s bargaining rights in the full-time unit prior to entertaining the trade union’s application for the combination of the part-time and full-time units. We will therefore defer our consideration of the combination application until such time as we make a final determination with respect to the termination application.

Termination Application

16. In his application, the applicant submitted a petition seeking the termination of the trade union’s bargaining rights bearing the names and signatures of six persons purporting to be employees of the full-time bargaining unit at Suedon Foods. Each name and signature corresponded to a name and signature on the list of employees filed by the intervenor employer. According to both the applicant and the intervenor employer, there were eight employees in the full-time bargaining unit on the date of the application, May 6, 1994.

17. The trade union took the position that there were only seven employees in the bargaining unit, asserting that Rebecca Taylor should not be considered an employee for the purposes of the count because she was not present at work on the date of application and did not return to work thereafter. Upon carefully considering the evidence adduced at the hearing, we are satisfied that although Ms. Taylor was indeed absent from work on the date of the application, she attended at work and performed work within the bargaining unit in her grocery clerk position both in the last week of April, 1994 and on May 9 and 10, 1994.

18. Furthermore, we do not find that there is sufficient evidence to support the trade union’s allegation that Rebecca Taylor was hired for the purpose of “stacking” the count in favour of the termination application. We note in this respect that the grocery clerk position was awarded to Ms. Taylor on April 25, 1994 as a result of a posting initiated almost two months earlier, and that she was the sole applicant for that position. Although we have some concerns with respect to her apparent inability to perform certain aspects of the job, her hiring is not inconsistent with the provisions of the collective agreement (and, it should be noted, no grievance was filed by the trade union alleging a breach), with the hiring practises of the present employer, nor with the conduct of “family” businesses in general. On balance, we are satisfied that the hiring was not undertaken in bad faith. Accordingly, having regard to the Board’s well-known “30/30 rule” that the parties agree is applicable in the present circumstances, we find that Rebecca Taylor is properly included

in the list of employees and that, therefore, there are eight employees in the full-time bargaining unit for the purposes of this application.

19. Having so found, and having earlier found that the application is timely with respect to the provisions of section 58, it would appear that the applicant has demonstrated the requisite support for the application subject to the requirement of establishing that the petition represents the voluntary wishes of the employees concerned. In order to ascertain the voluntariness of that evidence, which was challenged by the trade union, the Board heard testimony from numerous witnesses as to the circumstances concerning the origination of the petition, the manner in which each of the signatures on it was obtained, as well as evidence relating to the conduct of the employer.

20. The employer Suedon Foods is an "I.G.A." supermarket in Burlington, Ontario owned and operated by Wayne and Sue Taylor. The Taylors have operated the supermarket at that location only since the summer of 1992, at which time they purchased the business from a competing supermarket chain. By virtue of that transaction, it appears that Suedon Foods became a "successor employer" within the meaning of section 64 of the Act, with the result that the collective bargaining obligations of the previous employer with respect to the employees working in the store transferred to Suedon Foods. The trade union has held the bargaining rights relating to these employees for over twenty years, representing both the full-time and part-time employees in separate bargaining units with separate collective agreements. In addition to the eight full-time employees, there are approximately 27 part-time employees engaged at Suedon Foods.

21. The applicant William Edmonds is a full-time produce clerk at Suedon Foods. He was hired by Wayne Taylor in the summer of 1992 upon his taking over the operation of the supermarket. The evidence revealed that the idea of terminating the trade union's bargaining rights originated with Mr. Edmonds and Laurel Downey, the full-time bakery shop operator, although it appears that, throughout the process, Edmonds was the driving force. According to both Mr. Edmonds and Ms. Downey, their dissatisfaction with the trade union originated in its conduct of the previous round of negotiations with the employer, and was exacerbated by the circumstances of the strike in early 1994 at the Miracle Food Mart chain, to which the present trade union was a party. Underlying these concerns was what both Mr. Edmonds and Ms. Downey perceived to be the lack of attention accorded by the trade union to the interests of the full-time employees relative to the part-time employees.

22. Although they intermittently discussed the possibility of terminating the trade union's bargaining rights since late 1992, the first concrete steps in that respect were taken by them in the early spring of 1994, when they contacted the Board in order to obtain the appropriate materials and related information concerning the termination of bargaining rights. Upon obtaining these materials, they testified, it became clear to them that they required legal assistance and, ultimately, retained their present counsel, Mr. Wigle. Mr. Wigle advised them of the steps they were required to take to attain their purposes and also drafted the wording of the petition ultimately submitted to the Board.

23. Mr. Edmonds and Ms. Downey were provided a copy of the petition in early April, 1994. Due to an apparent misapprehension on their part as to the precise duration and effect of the statutory open period, Mr. Edmonds and Ms. Downey were under the impression that it was incumbent upon them to initiate the signing process immediately, and commenced making the requisite arrangements upon learning that the petition had been drafted. It was their intention to hold a meeting at a restaurant near the workplace with the members of the full-time complement in order to advise their co-workers of their intention to terminate the trade union's bargaining rights and to solicit their support. Both Ms. Downey and Mr. Edmonds were greatly impressed by the

advice of their counsel that they were to ensure that the process in which the signatures for the petition were obtained not give the appearance of employer support or knowledge, and took a number of steps to prevent that appearance from arising. Thus, on April 5, 1994, employees were approached individually by either Mr. Edmonds or Ms. Downey and asked to attend a meeting on April 8 whose subject-matter, the employees were told, would be disclosed only at the meeting. According to Mr. Edmonds, this was done in order to ensure that, as far as was possible, discussions of the termination process would occur during the employees' lunch breaks and other off-hours.

24. Out of this latter requirement and the need to accommodate the schedules of the employees arose the somewhat awkward procedure of holding two separate, but consecutive meetings on April 8, one at 11:30 am, the other commencing at 12:00. The 11:30 am meeting was attended by Mr. Edmonds, Ms. Downey, and two other employees. One of these employees (referred to in the hearing, in the effort to preserve the confidentiality of employee wishes regarding representation, as "P3") had his usual lunch break from 11:30 to noon, while the other ("P4"), had his day off that day. At the outset of the meeting, the two employees were advised by Ms. Downey, who had prepared a written statement for that purpose, that the objective of the meeting was to seek support for the termination of the trade union's bargaining rights. Ms. Downey also stated that the choice was to be the employees' alone, and that they should not feel pressured to give or refrain from giving their support. A wide-ranging discussion of the pros and cons of union representation ensued, during which time such matters as the retention of benefits, salaries, and other perquisites were discussed in response to questions from P4. Mr. Edmonds and Ms. Downey then signed the petition. According to both Ms. Downey and Mr. Edmonds, P3, whose anti-union sentiments were long-standing, wished to sign immediately upon learning of the petition. P4, by contrast, agreed to sign the petition only after the discussion had satisfied his concerns. Before the meeting concluded, the employees were once again told that the choice was to be theirs alone and that, to that end, they were to refrain from discussing the matter with anyone from management.

25. At approximately 12:00, two other employees, who commenced their lunch break at that time, attended at the restaurant, while P3 returned to his work. P4, being on his day off, remained in the restaurant. Ms. Downey and Mr. Edmonds in effect repeated the procedure from the first meeting, with Ms. Downey once again reading her prepared statement. The second group of employees was far more favourably disposed to the idea of continued union representation than the first, and a rather tense silence following the introductory statements was punctuated only by questions from P4. Although it was asserted by the union at the hearing that the Board should infer from P4's continued questioning that P4 had not yet signed the petition and that, therefore, the petitioners' account of the circulation of the petition was lacking in a fundamental respect, we are not of the view that the evidence supports that proposition. On balance we are satisfied that, in fact, P4 signed the petition document during the first meeting in the manner described by Mr. Edmonds and Ms. Downey.

26. The two employees at the second meeting refused to sign the petition, and the meeting concluded after only a brief discussion. Only at this time did Mr. Edmonds and Ms. Downey seek the signature of the remaining bargaining unit member, Adam Taylor, the son of Wayne and Sue Taylor. (It should be noted that, at this time, Rebecca Taylor had not yet been hired into the full-time unit and remained a part-time employee of Suedon Foods.) According to Mr. Edmonds, Adam Taylor had not been advised of the efforts to decertify the trade union until that time, nor was he asked to attend the meeting at the restaurant with the other full-time employees because of the "pressure" that a family-member's participation in the petition process might engender. He approached Adam Taylor at work that same day, and, once again declining to discuss the topic of termination on company premises, asked him to meet at a parking lot of an adjacent business dur-

ing the break. In the parking lot, Ms. Downey read her prepared statement, Mr. Edmonds explained to him the nature of his efforts and requested that he refrain from discussing the matter with his father and mother. Taylor then signed the petition. His name appears on the bottom of the petition and, Mr. Edmonds testified, he made no effort to obscure the identity of the other employees who had already signed.

27. According to Mr. Edmonds, it was only after the signatures had been collected in the manner described that he discovered that the “open period” for the filing of the termination application commenced on May 3, and not April 3. From this he concluded, incorrectly, that it was necessary for him to recirculate the petition and to obtain signatures at a time closer to the open period. He obtained another copy of the petition from Mr. Wigle for that purpose, and on April 28, 1994 he again approached employees for the purpose of obtaining their support for the termination application. The process of circulation of this second petition involved considerably less formality than the first, and, rather than reading a prepared “purpose statement”, Mr. Edmonds simply asked the employees he approached to resign the petition. Each of the employees who had signed the earlier petition readily agreed to sign the second one. Nevertheless, in each case, he refrained from discussing the termination application at work, and asked each of the employees to sign the petition off company premises, once again in the parking lot of an adjacent business. Mr. Edmonds testified that he did not bother approaching the two employees that had earlier refused to sign the petition because they had made their views known in rather categorical terms.

28. In the case of Rebecca Taylor, who was by this time working in a full-time capacity, Mr. Edmonds took considerable care to outline the nature of the application, and also advised her not to speak to her parents about the matter. Mr. Edmonds testified, and we accept, that at no time did he bring the petition onto company property nor did he or Ms. Downey discuss the matter of termination with members of management. However, as in the case of the first petition, no efforts were made by Mr. Edmonds to obscure the signatures of other employees before the petition was shown to Adam Taylor and, in the case of the second petition, Rebecca Taylor.

29. Upon obtaining these signatures, Mr. Edmonds and Ms. Downey immediately forwarded the second petition document to Mr. Wigle, who then promptly filed it with the Board. The first petition document was not submitted as part of the application.

30. Finally, it is important to note that the relationships between the members in the Taylor family were not only exceptionally close, but were also known to be such by the employees in the full-time bargaining unit. Both of the Taylor children, aged 20 and 21, still lived at home, and the family vacationed as a group. The evidence was that Rebecca continued to refer to her parents as “Mommy” and “Daddy”, in front of her co-workers. Mr. Taylor took considerable pride in the closeness of the family relationship at work both because of its undeniable intrinsic value, and because it was consistent with the “family business” image that he sought to affect. He conceded that, generally, there were no secrets between the members of his family, particularly with respect to work matters.

31. There was little dispute as to the applicable general principles to be utilized by the Board in the course of determining the present application. In applications for terminating bargaining rights, there is an onus on the applicant to establish on a balance of probabilities that a petition filed in favour of terminating the trade union’s bargaining rights represents a “voluntary” expression of the employees’ wishes. The function of the Board in this respect is to protect the rights of employees to make their own decision with respect to the question of union representation, as distinct from the decision of the employer. In this respect, the Board is sensitive to the fact that in the employment relationship, the employer has a preponderance of power to influence the

destiny of the employees working for it and that the issue of voluntariness of employee desire must be understood in that context. Although *Piggott Motors (1961) Limited*, 62 CLLC par. 16,264, cited by counsel for the trade union, was written with respect to a petition filed in an application for certification, the reasoning in it is equally applicable to the circumstances surrounding an application for termination:

In view of the responsive nature of his relationship with the employer, and his natural desire to appear to identify with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form or a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to a trade union truly and accurately reflects the voluntary wishes of the signatories.

32. Conscious of these factors, the Board will carefully examine the overall circumstances of the origination, preparation, and circulation of the petition to satisfy itself that the choices indicated in the petition are truly those of the signatories. Of particular concern in this respect is the *perception* by employees of employer involvement in the termination application since it is the appearance, which may or may not coincide with reality, that will influence the wishes of the employees. For this reason, the Board will not normally accept petitions as voluntary when the process of their origination and circulation is such that would cause employees to believe that management personnel may be involved even if, in fact, there was no such involvement established. Similarly, petitions may be rejected as involuntary in circumstances in which it would appear to an employee that the fact of his or her signing or not signing would become a matter known to management, even if, in fact, management had no knowledge of the petition.

33. The trade union attacked the voluntariness of the petition in the present circumstances on a number of grounds, mostly related to what it characterized as the employer's involvement in the origination and the circulation of the petition. Although we have considered these arguments and the evidence led in support of them, it is unnecessary to detail them here. It is sufficient to note that the evidence simply does not support the general allegation that the employer was, in fact, "behind" the present application, nor that, as noted above, it attempted to "stack" the bargaining unit with family members. Similarly, we are satisfied that neither Mr. Edmonds nor Ms. Downey were in positions of sufficient managerial authority in the workplace nor otherwise so manifestly "close" to the Taylors such as to give rise to the reasonable apprehension by members of the full-time unit that the fact of their signing or not signing would become known to members of management.

34. Of considerably more concern to the Board with respect to the voluntariness of the petition are the issues arising out of the presence in the bargaining unit of what the trade union characterized as the two "dependent" Taylor children and their participation in the petition process. The concerns in this respect raised by the trade union are twofold. First, given the highly dependent and close nature of the relationship between the children and their parents described above, there is reason to doubt that the Taylor children formulated the kind of voluntary expression of desire the Board normally requires of "employee wishes". In this respect, the parties carefully reviewed the Board's practise with respect to the voluntariness of statements of desire made by "dependent family members", including *Otto's Deli*, [1980] OLRB Rep. Nov. 1673, *King George Hotel*, [1988] OLRB Rep. Dec. 1278, and *Alan Reitzel*, [1990] OLRB Rep. Aug. 881. Second, in light of the fact that the close relationships in the Taylor family were obvious to members of the bargaining unit, the voluntariness of the signatures of the non-family member employees was seriously jeopardized where, as in the present case, no precautions were taken to ensure that the Taylor children would

not see who had signed the petition and, more particularly, where the employees were given no assurance that such would be the case. In the absence of such measures, it was submitted, the employees other than the Taylor children would reasonably believe that the fact of their signing the petition would become known to the employer.

35. Turning first to the second argument advanced by the trade union, there is no question that the procedure chosen by the applicant and Ms. Downey to collect signatures for the petition was less than optimal, and that the Board would be more confident of the voluntariness of the signatures on the petition were they to be obtained in a manner in which the Taylor children were not to be permitted to see the signatures of the other employees. Under the circumstances, we feel, this would not be an unreasonable burden to place upon an applicant and could be accomplished through the simple expedient of a separate petition document for the family members. Most significantly, however, the other employees could have been advised that such a procedure would be followed. In the absence of any such assurance, the possibility that employees signed the petition at least in part out of fear that their employers would learn of their decision regarding union representation is not far-fetched. The question is, however, whether such a possibility, in the present case, in fact affected the voluntariness of the signatures.

36. In making such an assessment, it is necessary to do so in the context of the overall circumstances in which the petition was signed. While, as noted, the procedure chosen by the applicant may leave open the possibility of management knowledge, in other respects the method of collection of the signatures can be seen to be sending quite a different message. Somewhat elaborate efforts were taken by the applicant and Ms. Downey to ensure that any communications regarding the petition were to take place off company premises and not during working hours. Further, the employees who signed the petition were expressly told that the decision whether or not to sign was theirs alone and, more significantly, were told that they were not to disclose the existence of their decertification efforts to members of management. In our view, the significance of these measures would not have been lost upon the employees and, although falling short of an assurance that members of management would not be privy to their decisions, nonetheless provided them some indication that the confidentiality of their choices was an interest of some value.

37. Further, the Board heard considerable evidence with respect to the process of decision-making undertaken by each of the non-family member employees who signed the petition. In each case, it appeared that the decision to sign the petition was not affected by the possibility that the employer may have become aware of the contents of the petition. The instances of Ms. Downey and Mr. Edmonds are relatively simple in this respect: it is abundantly clear that their decision to seek the termination of the trade union's bargaining rights was made long before the petition process commenced, and we are therefore confident that their decision to sign the petition was not substantially affected by the possibility that the Taylors might become privy to the document. To similar effect, in light of the evidence of employee P3's long-standing hostility toward the union, and his eagerness to sign the petition immediately upon it being presented to him, we are satisfied that the possibility that the Taylors may become aware of his choice was not an operative factor in his decision to sign.

38. The situation with respect to employee P4 is somewhat more difficult, there being no evidence with respect to his intentions prior to the April 8, 1994 meeting at which the petition was produced. There was, however, considerable evidence from Mr. Edmonds and Ms. Downey with respect to the nature of the considerations he entertained during the course of that meeting. Having regard to those considerations, we are satisfied that employee P4 engaged in a reasoned and independent assessment of the consequences of his choice, and, on balance, the evidence does not

suggest that an apprehension that the employer may become aware of his choice through the conduct of the Taylor children was a factor in his decision.

39. Having regard to all of the circumstances, then, we are satisfied that the collection of signatures in a single petition document is not fatal to the voluntariness of the signatures of the non-family member employees. While the procedure chosen by the applicant leaves the possibility of employer knowledge open, in the present case, the evidence supports the proposition that this possibility did not have an operative effect upon the decision of the employees to sign the petition. Thus, although our decision in this respect is "close to the line", we are nonetheless satisfied on the basis of the evidence presented that the four "non-family" employees decided to sign the petition in a voluntary manner.

40. In light of this finding, it is unnecessary for us to determine whether the signatures of Adam and Rebecca Taylor were voluntarily obtained since a finding adverse to the applicant in this regard could not affect his having established that more than forty-five per cent of the employees in the bargaining unit voluntarily signified that they no longer wished to be represented by the trade union.

41. Accordingly, the matter will be put to a representation vote, and all employees can express their wishes by secret ballot. Voters will be asked to indicate whether or not they wish to continue to be represented by the responding party trade union. All employees in the bargaining unit on the date of this decision who do not voluntarily terminate their employment or who are not discharged for cause between the date of this decision and the date the vote is taken shall be eligible to vote.

42. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER H. PEACOCK; February 14, 1995

1. I dissent from the decision of the majority in regard to the issue of voluntariness.

2. Given the circumstances of the presence of the owner's son and daughter as employees in the bargaining unit, and their opportunity to observe the names of those who had signed the second petition as described in paragraphs 26, 27, and 28, I find that employees considering whether to support this application to terminate bargaining rights would have had a reasonable apprehension that their decision would become known to management.

3. Accordingly, the petition lacks the necessary element of voluntariness for the application to succeed and I would dismiss it.

1573-94-U Donna Glover et al, Applicants v. United Food & Commercial Workers International Union, Locals 175 and 633, Responding Party v. The Great Atlantic & Pacific Company of Canada Limited, Intervenor

Ratification and Strike Vote - Strike - Employee complaining that contract ratification vote preceded by insufficient notice, and that undue pressure was applied to accept contract offer - Board dismissing application for failing to disclose prima facie case

BEFORE: *Kathleen O'Neil*, Vice-Chair.

APPEARANCES: *James Deep* (as agent for *W. N. Brooks*), *Donna Glover* and *Charlie Lyon* for the applicants; *Kelvin Kucey* and *Bud Ada* for the responding party; *Charles R. Robertson* and *Paul Rucurean* for the intervenor.

DECISION OF THE BOARD; February 22, 1995

1. This is an application under section 91 of the *Labour Relations Act* with reference to sections 69, 74.5 and 74.6. It became clear at the hearing that the focus of the complaint was section 74, which concerns itself with the proper conduct of votes by unions.
2. At the outset of the hearing, the applicant also clarified that, although the employer, A & P Grocery Stores, is listed as a responding party, none of the allegations were against the employer. On the parties' agreement, the three person panel was dispensed with, and this matter was heard by a Vice-Chair sitting alone.
3. The thrust of the complaint is that there was not enough notice given for a meeting at which a ratification vote was held. Further it is said that there was misleading information concerning the details of the contract, and that undue pressure was applied to accept the contract offered.
4. A motion was made to the Board for dismissal on a *prima facie* basis which was dealt with by the Board, differently constituted, by decision dated September 14, 1994. Declining to dismiss at that stage of the proceedings, the Board instead ordered particulars to be provided, and drew the applicant's attention to the Board's rules to the effect that one must plead and particularize what one wishes to prove.
5. The applicant did deliver further particulars, and the union renewed its motion to dismiss without a further hearing when the matter came on for hearing on November 30, 1994. Having heard the parties' submissions, in which the employer supported the union's motion, I orally granted the motion making the following comments:

I am faced with a motion to dismiss under Rule 24, or for delay, or because the remedy requested would be hollow or prejudicial in view of the labour relations realities affecting the parties.

It has become clear that section 74(5) and (6) are the focus of this complaint. They require that (inter alia):

- 1) all employees in the bargaining unit be entitled to participate in a ratification vote, and
- 2) the vote be conducted in such manner that those entitled to vote have ample opportunity to cast their ballots.

I am prepared to assume that this requires adequate notice of the vote, even though the statute is not explicit on that point.

I have looked at the pleadings filed and I have assumed the facts set out therein to be true and probable. I will provide further reasons at a later date, but I am persuaded that the pleadings filed do not set out a case for the remedy sought - being an overturning of the vote.

In light of my view of the case on a *prima facie* basis, it is unnecessary to comment on delay or other matters raised. The application is dismissed for want of a *prima facie* case.

6. These are the further reasons for that decision.

7. A collective agreement between UFCW and A & P expired on June 13, 1994. Ongoing negotiations had failed to produce a renewal collective agreement. Notice of a July 1, 1994 meeting was posted on the evening of June 28, 1994 in the store where the applicant Donna Glover worked. Ms. Glover saw it, but had already made plans for July 1, which she did not wish to interfere with, and she did not attend the meeting.

8. The notice said the following in relation to the agenda:

AGENDA TO BE DETERMINED

INFORMATION MEETING - In the event we are on strike

OR

RATIFICATION VOTE - In the event we are able to reach a settlement or the Committee decides to have a vote.

9. A draft Memorandum of Agreement was signed on June 29, 1994, and the meeting became a ratification meeting. The contract was rejected in the Hamilton area, but ratified province-wide.

10. The relevant provisions in the Act and the Rules of Procedure are as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

* * *

74.- (4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

* * *

24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its

reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.

11. The relief sought in this matter is a provincial re-vote on the contract offer which the membership accepted by a vote on Friday, July 1, 1994. It is clear that underlying this is the feeling on the complainant's part that the settlement accepted was unfair. Indeed, in the region from which Ms. Glover comes, Hamilton, the deal was soundly rejected. But the contract is a provincial one, covering approximately 10,000 workers, and the majority of those voting across the province voted in favour of the contract. Attached to Ms. Glover's application was a petition indicating dissatisfaction with the contract from about 600 people, which we are informed are from various parts of the province. Although it is not explicitly requested in the application, it is clear that what the applicants want is for the deal to be undone.

12. The basis for this relief is said to be found in the fact that some people either did not see the notice, or had plans for the holiday weekend which meant that they were not able to vote. Further, it is said that some part-time employees did not have scheduled work hours in the period between the notice and the meeting, and thus, it would have been impossible for them to have had notice. It is pleaded that slightly less than a third of the 10,000 members eligible to vote actually voted, which is said to constitute an egregious violation of the rights of the membership.

13. Further, it is pleaded that a union staffer said that if the membership did not accept the offer they would be out of a job, and that without the buy out provisions in the offered collective agreement, many of the stores would go out of business. As well, it is complained that insufficient documentation was given to the membership, since they were only given a list of the changes to the former collective agreement, and were not also given a copy of the former collective agreement at the meeting. It is also alleged that this sequence of events constituted bad faith bargaining, although it was clarified at the hearing that no relief was requested under section 15 of the Act, which is the section providing for the duty to bargain in good faith.

14. The union submits that the application should be dismissed for want of a *prima facie* case because it is insufficiently particularized. For instance, there are no particulars of anyone who did not get notice of the meeting. The applicant clearly did get notice. The union also bases its motion on delay, saying that any remedy awarded at this point would be hollow. The contract was ratified on July 1, 1994, and was implemented by the employer. It had been in place for almost six months at the time of the hearing, and almost a month when the application was first filed. It was October, when the particulars were filed, before the union knew anything about what the complaint was really about, says counsel. By then, hundreds of employees had taken early retirement under the provisions of the ratified collective agreement. The collective agreement provided for a series of buy-outs which are said to be irreversible. Union counsel notes that an application for interim relief could have been brought, but was not.

15. Further, the union observes that the percentage of people who voted is about the same as in the average municipal election. Union counsel also referred to a number of facts that he would prove, but except as accepted by the applicant, it is not appropriate to consider those facts as a basis for my decision, and I have not done so. As I said orally, I have assumed the facts recited by the applicant to be true and provable.

16. For the applicant, Mr. Deep argued that the appropriate remedy in the circumstances was further particulars, not dismissal. He submitted that it was fair to assume that people had plans for the holiday weekend, and that he had affidavit evidence from people who could not attend the meeting. He also clarified that certain of the allegations in the pleadings, such as that the union intentionally put the vote on a holiday so that members would not vote, were a matter of Ms. Glo-

ver's belief, and that there was no further evidence about that point he wished to call. He offered no particulars of anyone who did not get notice of the meeting.

17. On the issue of delay, counsel says that Ms. Glover needed a few weeks to gather information and support, that in the circumstances she acted quite promptly. Any steps the parties took to implement the collective agreement, after July 29, 1994 when they were on notice of Ms. Glover's claim, were strictly at their own peril, in counsel's submission.

18. As to the application of Rule 24, applicant's counsel says that the allegations are simple: insufficient notice, and inadequate disclosure. Counsel urged the Board to give section 74(5) some meaning: one must at least be in a position to get notice. The notice period should have been longer, and it is suggested that the message that there might be a ratification vote was insufficiently clear. Further, it is said it was too difficult to follow the discussion because the only hand-outs at the meeting were about the changes to the previous collective agreement, and no copies of the previous contract were given out. It is submitted that the union could have at least told people to bring a copy of their collective agreement if it was considered too onerous to pass out copies to 10,000 people.

19. The Board's decisions interpreting section 74 have made it clear that, although a union is not required to hold ratification votes, if it does, it must comply with the sections. The purpose of the provisions has been set out most extensively in *R.C.A. Limited*, [1981] OLRB Rep. August 1159. As the Board there pointed out, the sections provide a minimum of protection, in a procedural way, but the wording is deliberately general. This is to be understood against the background of the statute's otherwise general approach - which is not to regulate closely the internal affairs of trade unions, except to the extent that they breach the duty of fair representation or referral set out in sections 69 and 70.

20. On the facts of this case as pleaded by the complainant, a case for the remedy of overturning the provincial ratification vote was simply not made out. The length of time between the posting of the notice and the meeting was not unduly short in the context of collective bargaining, which often runs on very tight timelines. A similar length of time of notice was found not to be a basis for interference in *Inter-Bake Foods Ltd.*, [1981] OLRB Rep. August 1145, even where there was a substantial amount of confusion as to the date of the meeting. No similar factor was pleaded here. There as well, people had plans which they did not wish to change, and thus did not attend the ratification meeting. The Board there held that the fact that many employees were inconvenienced by the timing of the meeting did not disclose a violation, and it is my view that the same is true of the facts pleaded before me. A requirement that the union hold out for the convenience of all 10,000 employees before scheduling a ratification vote is simply too impractical to impose. Nor is it illegal to hold the vote on a holiday, unless there were additional facts pleaded from which one could infer illegality. There are no such additional facts before me.

21. The applicants assert that it was impossible for people who did not have hours in the store during the two days the notice was up to have notice of the meeting. This is simply not a conclusion that is warranted on the facts as pleaded. To conclude it was impossible would require a host of assumptions such as that employees were not following the negotiations, did not come into the store for other reasons, did not speak to other employees or union representatives, none of which are warranted on the facts pleaded. There is not a single instance of any person who did not have actual notice of the meeting pleaded. It is clear that Ms. Glover herself did have notice. As to employees in other areas, there are simply no facts pleaded from which I can conclude that a *prima facie* case was made out of lack of notice.

22. As to the manner of presenting the collective agreement, I am not persuaded that fail-

ure to provide collective agreements or engage in more detailed discussion amounts to a breach of section 74. The remarks allegedly made by union representatives at the meeting for the Hamilton area, are alleged to be a basis on which I can conclude that people did not have an ample opportunity to vote and thus order the vote re-done. I cannot come to that conclusion on the facts before me either. There is no allegation that either the linking of rejection of the contract to store closures was untrue, or that there was any procedural irregularity at the meeting. Moreover, the people voting at that meeting soundly rejected the contract. There is no suggestion that re-running the vote in the Hamilton area, presumably to gain a wider margin against the contract, could have the result of turning the tide of the province-wide results. Thus, to re-run that meeting so that there could be a more definitive rejection of the contract would be pointless on the facts before me.

23. There are no particulars of other meetings than the one held in the Hamilton area. Further, there is simply nothing pleaded other than the length of time between the settlement and the ratification meeting that is obviously applicable to other areas of the province. I have dealt with the length of time above. The fact that some 600 people expressed their dissatisfaction with the settlement obtained is not a fact which discloses a breach of the Act. Nor are there any other facts pleaded which make out a case for re-running the ratification vote. Thus, I found no basis in the pleadings to re-run the provincial ratification vote as requested, and accordingly I dismissed the application for want of a *prima facie* case.

3730-93-R; 3731-93-R Canadian Union of Public Employees, Local 79, Applicant v. The Municipality of Metropolitan Toronto, Responding Party

Bargaining Unit - Combination of Bargaining Units - Board in earlier decision finding that monitoring of other employees by security officers employed by municipality raising real possibility of conflict of interest if security officers included in municipality's full-time bargaining unit - Union now seeking to combine newly certified bargaining unit of security officers with existing full-time bargaining unit - Board not prepared to grant application where statutory preconditions outlined in section 6(6) of the Act are met - Application to combine bargaining units dismissed

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *S. C. Laing* and *P. V. Grasso*.

APPEARANCES: *David McKee*, *Dennis Casey* and *Jack Kirkby* for the applicant; *Darrel Smith*, *Harold Ball*, *Kalli Chapman* and *Vince Quattrociocchi* for the responding party.

DECISION OF THE BOARD; February 13, 1995

1. This is a continuation of proceedings in which decisions of this panel of the Board, dated June 15, 1994 [now reported at [1994] OLRB Rep. June. 795] and August 3, 1994, have already issued. Board File 3730-93-R is an application for certification.

2. The Board finds that the applicant (also referred to as the "union") is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having further regard to the agreement of the parties, the Board further finds that:

all security guards employed by the Municipality of Metropolitan Toronto in the Municipality of

Metropolitan Toronto, save and except shift forepersons, persons above the rank of shift foreperson, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of February 1, 1994,

constitute a unit of employees of the responding party appropriate for collective bargaining.

Clarity Note: For the purposes of clarity, the parties agree that the persons in the bargaining unit as of the date of application were employed in a classification of security officer. The bargaining unit does not include persons employed in the classification of security guard which is a classification covered by the current collective agreement between the parties.

4. The Board is satisfied on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 1, 1994, the certification application date, had applied to become members of the applicant on or before that date.

5. A certificate will issue to the applicant.

6. In Board file 3731-93-R the applicant seeks to combine the newly certified bargaining unit composed of some 17 Security Officers ("SO"s) with a previously existing bargaining unit of some 6,000 Metro employees (the latter unit has and will continue to be referred to as the "full-time unit").

7. The employer has and continues to take the position that, in the circumstances of this case, section 6(6) of the Act, if not explicitly, then at least effectively, precludes the Board from granting the combination application being sought.

8. Section 6(6) of the *Act*, upon which Metro relies, provides as follows:

6. . . . (6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

Section 7(3) of the Act outlines the relevant considerations in relation to combination applications:

7. . . .

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

9. At the hearing which resulted in our June 15, 1994 decision in this matter, the parties agreed to proceed as set in paragraph 4 of that decision:

4. Metro asserts that the monitoring performed by SOs of other employees would give rise to a conflict of interest if the SOs were included in the bargaining unit with the employees they monitor. The union disputes this claim. Metro further asserts that the determination of this question will be determinative of the union's combination application. While the union disagrees that determination of this issue will necessarily be dispositive of its combination application, it did not dispute that an assessment of the conflict of interest, if any, resulting from the inclusion of the SOs in the full-time unit is a central issue in the case. As a result, the parties agreed to jointly request that, prior to finally disposing of the matters before it, the Board hear evidence relevant to the duties and responsibilities of SOs and determine whether, to adapt the words of section 6(6), it is satisfied that the monitoring of other employees by SOs would give rise to a conflict of interest if the SOs were included in the bargaining unit with the employees they monitor. Having regard to the parties agreement and the Board's view that proceeding in this fashion was sensible and provided some potential economy, the Board proceeded on this basis. We note that the union's agreement to this manner of proceeding was without prejudice to its position that the Board's initial determination would not necessarily dispose of the matter or to its right to call further relevant evidence not directly related to the duties and responsibilities of SOs.

10. After proceeding in the fashion agreed to by the parties, the Board concluded (at paragraph 18 of the June 15, 1994 decision) that it was "satisfied that the monitoring of other employees by SOs raises the real possibility of a conflict of interest if the SOs were included in the full-time bargaining unit."

11. At the request of the union and over Metro's objection (see the Board's August 3, 1994 decision), this matter was listed for further hearing. The union had indicated that it wished to call evidence to establish that there are employees in the full-time unit (while not SOs and not even necessarily "guards" as that word is used in section 6 and has come to have been understood in the labour relations context) whose functions include the monitoring of other employees to the same extent as that function is performed by SOs. The union further asserted that consideration of this evidence would be relevant to the issue of whether any serious labour relations problems would be raised by the proposed combination of bargaining units.

12. None of the additional evidence placed before the Board when the hearing resumed was either controversial or seriously challenged. In these circumstances, it is unnecessary for us to review it in any significant detail. What follows then is but a succinct description of that evidence.

13. David Cusack is currently an employee in the full-time unit and is classified as a security/reception officer ("S/RO") at Metro Hall. Mr. Cusack gave evidence regarding the duties and functions associated with that position. Prior to the opening of Metro Hall, Metro leased five floors of space at 390 Bay St.; Mr. Cusack spent some 4 years employed as a security guard ("SG"), a full-time bargaining unit position, at that location. He also testified about the duties and functions associated with that position.

14. Dan Gormley was also a witness for the union. He is currently employed as an SG and works at Metro's archives facility located at Spadina and Dupont. There are some 25 Metro personnel who regularly work at that location (we were not advised precisely how many of those are full-time bargaining unit employees). There are certain areas of the facility (the exhibit area, the theatre, and the research hall) to which the public has unrestricted access during regular business hours. Mr. Gormley testified as to the duties and functions associated with his position.

15. The parties provided some further agreed facts regarding bargaining structures and benefits. They also agreed that SGs employed by Metro at 703 Don Mills Road (which houses police and other services) have access to the records of the use of electronic cards required to access the front and certain internal doors and that the evidence of George Hines (an SG employed at that

facility) would be that he is regularly requested to obtain information from such records for his supervisors for the purposes of their investigations. The union filed a number of arbitration awards between the parties as evidence in these proceedings. Without reviewing these in any detail, which neither party did, it suffices for our purposes to note that all of these cases involved situations where bargaining unit employees testified as Metro witnesses (under summons) at arbitration hearings regarding discipline imposed on fellow bargaining unit employees. The employee witnesses in these cases came to testify in, broadly speaking, one of two ways: either their positions (such as foreman grade 1 or grade 2) involve some supervisory duties or, for other (perhaps more fortuitous and institutionally less predictable) reasons they had happened to be witnesses to events relevant to the imposition of discipline in the particular case. None of the cases filed involved SOs or S/ROs or SGs testifying for Metro as witnesses against full-time bargaining unit employees.

16. Finally, insofar as the evidence we heard, Metro called Harold Ball, the director of labour relations. Although his evidence might, at times, have been mistaken for a rehearsal of the employer's argument on the point, Mr. Ball, in a frank and straightforward fashion, expounded his views regarding the possible labour relations problems which might result were the instant combination application to be granted.

17. The union's argument begins with the proposition that certification and combination applications are separate and distinct proceedings and that the disposition or manner of treatment of the former need not be dispositive of the latter. And while the existence of a conflict of interest might require the Board, in the context of a certification application, to find a "guards only" unit to be appropriate by virtue of section 6(6) of the Act, that, in and of itself, should not be a bar to the subsequent or perhaps even simultaneous combination of that "guards only" unit with another bargaining unit. The determination of the combination application must rest on the factors set out in section 7(3) and, in particular, an assessment of the labour relations harm, if any, likely to flow from the combination sought. Put somewhat more dramatically, the union accepts, given our previous decision in this matter, that if this were an entirely fresh certification application in which the union sought to achieve bargaining rights for a unit that included both SOs and the other full-time employees, section 6(6) would require the creation of two separate units, one of which would be "guards only". Despite that acknowledgement the union argues that it is entitled to, at the same time or later, seek to combine those two units into one. Further, it asserts, the finding of a real possibility of conflict of interest under section 6(6) does not inexorably lead to the conclusion that serious labour relations problems will flow from the combination.

18. The employer's position is relatively straightforward - the combination application sought by the union is precluded by section 6(6) and the Board's prior decision in this matter; alternatively, the Board ought not to grant the combination because serious labour relations problems would result.

19. In support of their various positions the parties referred to and discussed a number of authorities including decisions of the Board in *Cineplex Odeon Corporation*, [1994] OLRB Rep. July 824; *The Hydro-Electric Commission of the City of Ottawa*, [1994] OLRB Rep. Apr. 516; *The Municipality of Metropolitan Toronto*, [1992] OLRB rep. Mar. 315; *Lay-All Drywall Ltd.*, [1988] OLRB Rep. Mar. 308; *B A Banknote a division of Quebecor Printing Inc.*, (unreported November 8, 1994, Board File 2113-94-R) [now reported at [1994] OLRB Rep. Nov. 1484]; as well as extracts from *Driedger on the Construction of Statutes* (3rd edition).

20. We should observe first that we have not found the latest evidence advanced by the union to be particularly helpful. Certainly, to the extent it had been suggested that there are employees in the full-time bargaining unit whose functions include the monitoring of other employ-

ees to the same extent as that function is performed by SOs, the union's evidence regarding S/ROs and SGs has simply not lived up to its advance billing. There is no doubt that S/ROs and SGs may, from time to time, be called upon to perform monitoring functions which mirror those performed on a more regular basis by SOs. We should also emphasize, as we did in our June 3, 1994 decision in this matter, that SOs do not spend the vast majority of their time investigating or otherwise dealing with alleged improper conduct by full-time employees. Yet the monitoring functions they performed were significant enough for us to conclude that there is the real possibility of a conflict of interest if the SOs were included in the full-time bargaining unit. The measure of the difference between the SOs on the one hand, and the S/ROs and SGs on the other, is that it is not at all apparent to us that the latter group is one which, in a hypothetical fresh certification situation, would have to be segregated from the other full-time bargaining unit employees by virtue of section 6(6). Whatever points of comparison there may be (and there are some) between the SOs and the other two classifications, the fact that the latter have been included in the full-time bargaining unit for some time is not of great assistance in determining what labour relations problems, if any, would arise if the SOs were included as well. Similarly, neither do we find the arbitration awards between the parties filed by the union to be particularly instructive. The fact that Metro has previously faced conflict of interest situations involving other bargaining unit employees testifying against each other at arbitration hearings is, frankly, of little assistance to us in determining the likely labour relations difficulties which might be associated with the inclusion of SOs in the full-time bargaining unit.

21. On the other side of the ledger, neither have we found Metro's evidence or argument regarding labour relations difficulties to be particularly persuasive. Mr. Ball was extremely candid in displaying his unhappiness at the prospect of the SOs being represented by the same bargaining agent as the full-time employees. He recognized and did not dispute that is the unavoidable result here, given the recent legislative changes and the level of support among SOs for the applicant. Having the SOs included in a separate bargaining unit was, for him, a distant second choice. The vast majority of potential problems and concerns articulated by Mr. Ball arise from the SOs being represented by the applicant, whether they are in the same or a different bargaining unit from full-time employees.

22. In essence both parties, for very different reasons, are having difficulties adapting to and accepting the recent changes to the Act. Mr. Ball is clearly unhappy with the prospect of the applicant representing both SOs and other employees. The union, on the other hand, seeks to persuade us that difficulties involving conflicts of interest can be resolved by reasonable people and should not be a bar to a combined unit. The employer is having some difficulty accepting that the statute permits the same bargaining agent; the union is unhappy that section 6(6) generally requires separate bargaining units for guards.

23. We have not found it necessary to plumb the depths of this conflict which may, on the facts of this case, be difficult to resolve. Section 7(3)(a) through 7(3)(c) set out three factors the Board must consider in disposing of a combination application. We are prepared to assume, without finding, that each of these factors otherwise point to the granting of the application. The preamble to the enumerated factors also permits the Board to take into account such factors as it considers appropriate. Although this is a combination application, we cannot ignore the wording of section 6(6). The applicant concedes that, given the Board's previous finding, if this were a fresh certification application, the SOs would find themselves in their own separate bargaining unit by virtue of the application of section 6(6). The union, in advancing its combination application, is asking us (in a fashion not entirely dissimilar to the employer request in the *B A Banknote* case, cited above) to effectively read out or ignore the clear provisions of section 6(6).

24. We simply find it inconceivable that where, as here, the statutory preconditions outlined in section 6(6) are met, the Act could direct that guards be included in their own bargaining unit separate from other employees and simultaneously permit a trade union to avoid that result by the expedient of a combination application. On that basis alone and, consequently without the need to finally determine whether the combination here sought would create serious labour relations problems, we are of the view that this application ought not to be granted. Since some reference was made to other subsections of section 6, we should observe that our decision should not be taken to mean that, in every case where a bargaining unit is deemed appropriate under subsections 6(2.1) through 6(5), this will necessarily constitute a barrier to its later combination with another unit. The statutory preconditions and policy considerations upon which these various subsections are constructed are different from those evident under section 6(6).

25. In summary, a certificate will issue to the applicant in respect of the bargaining unit set out in paragraph 3 above; the application for combination of bargaining units is dismissed.

3798-94-R United Steelworkers of America, Applicant v. Market Drive Donuts Ltd., c.o.b. as Tim Horton Donuts, Responding Party v. Group of Employees, Objectors

Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Union moving that Board not inquire into certain employee allegations of undue pressure and misrepresentation during union's organizing drive - Board satisfied that allegations of intimidation amounting to nothing more than persistence, perhaps exaggerated salesmanship, or insensitivity - Board finding no reason to discount membership evidence simply because employees asked for union cards back and were refused - Board seeing no reason to direct representation vote - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *R. R. Montague*.

APPEARANCES: *James Hayes*, *Mike Armstrong* and *John Aman* for the applicant; *C. E. Humphrey* and *Diego Sdao* for the responding party; *Ingrid Drabik*, *Jean Laufman*, *Lisa Shepherd*, *Jaime Sheppard*, *Norma Redding*, *Jennifer Altenburg* and *Alana Christie* for the objectors.

DECISION OF THE BOARD (BOARD MEMBER F. B. REAUME DISSENTING IN PART);
February 28, 1995

1. The name of the responding party in the title of proceedings is amended to read: "Market Drive Donuts Ltd., c.o.b. as Tim Horton Donuts".

2. This is an application for certification. At the hearing of this matter on February 27, 1995, the Board made the following oral ruling:

This is an application for certification. The Board scheduled a hearing to deal with outstanding issues arising out of a number of letters written by employees in this bargaining unit. These letters make allegations, amongst other things, of undue pressure and misrepresentation during the organizing drive. These employees, a number of whom appeared at the hearing and made representations to the Board through a representative, ask the Board to order a representation vote as a result of their allegations.

The union has made a motion to the Board that it not inquire further into these allegations because, even if the Board accepts the facts as stated as true, they do not make out a case for the relief requested.

The Board heard the representations of the parties on this motion.

Having considered the submissions and reviewed the material before us, the Board is satisfied that the union has established that it had, as of the time this application was made, the support of more than 55 per cent of the persons in the bargaining unit. The Board sees no reason to order a representation vote.

Many of the allegations contained in these letters relate to feelings by employees that they were pressured during the organizing drive. It is important to note that many of the persons who make this allegation were able to resist this pressure and did not actually join the union. The "pressure" consists in large part in being approached at work, at home, over several occasions. There is a suggestion that some of the persons, who are students, are particularly vulnerable. There are also allegations that people were given extravagant promises about what the union could do for them, which they have found out to be untrue.

Having carefully reviewed the allegations of undue pressure, we are satisfied that there is nothing more here than persistence, perhaps exaggerated salesmanship, or insensitivity. It falls short of what the Board would consider to be intimidation or coercion. As the Board's decisions have stated, the Board cannot hold people to artificial standards of social interaction. During an organizing campaign, it would not be a surprise if people feel peer pressure, and if people get worked up and end up offending others. It would also not be a surprise if some people make a decision that they later regret. But it is not unlawful to be rude or annoying. The Board has to assume that the average employee has some ability to make his or her own decision. And indeed, many of the people who have written to the Board have shown themselves very capable of making up their own minds.

Turning to the allegations about the return of union cards, the majority finds, Mr. Reaume dissenting, that there is no reason to discount membership evidence simply because employees asked for them back and were refused. This is well-established in the Board's cases. Whether or not the union has a practice of giving back cards is not relevant to our determination of whether, at the time of the application, the union has established through membership evidence that it has the requisite support. The Board does not take this union's evidence and admissions in *Ken Bodnar Enterprises Inc.*, [1994] OLRB Rep. June 688, as a statement of law. As the Board indicated in *Havlik Technologies Inc.*, [1992] OLRB Rep. Apr. 468, a request to have a card returned, which can be seen as a desire to revoke membership, is like any change of heart. It must be timely, in writing and signed by the employee concerned to have any effect on an application for certification.

The only two instances which *may* have caused the majority to inquire further relate to the allegations that employees were told they could ask for their cards to be returned before they signed their cards. We say *may* because we have some concerns as to whether a *prima facie* case has been established even with respect to these two instances. There is some doubt in our view as to whether it would have been reasonable for either employee involved to have accepted such a representation, assuming it was made, where the representation clearly comes from a rank and file employee who does not represent the voice of the union, and where there is no suggestion that the employees in question could not have investigated the matter further before relying on it.

We also have some doubt as to how clearly and precisely this allegation has been made out. However, even taking a generous view of the matter, and accepting that there is an allegation that two employees were told that they could join the union, change their minds and have their cards back, to induce them to sign, the majority finds that it is unnecessary for the Board to decide whether or not this constitutes a *prima facie* case such that we should inquire into this issue. Even if these events were established and the Board saw reason to discount the cards, on the circumstances alleged and all the material before us, there is nothing that would lead us to give less than full weight to any of the other cards. Even if these two cards are discounted, the union is still in a position to obtain automatic certification.

Accordingly, subject to the Board's usual second check, a certificate will be issued to the union.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. Having regard to the agreement of the parties, the Board further finds that all employees of Market Drive Donuts Ltd., c.o.b. as Tim Horton Donuts in the Town of Milton, save and except supervisors, persons above the rank of supervisor and office and clerical staff, constitute a unit of employees of the responding party appropriate for collective bargaining.

5. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on January 27, 1995, the certification application date, had applied to become members of the applicant on or before that date.

DECISION OF BOARD MEMBER F. B. REAUME; February 28, 1995

1. With respect to the majority decision, I must dissent in part on the following basis.

2. It is clear that four employees indicated changing their minds and wanting their cards returned as alleged it was promised.

3. Of these four employees, two clearly indicate that they were promised this opportunity. There is however, no clear evidence or claim about what the other two employees may not have been told in this regard, nor whether or not they directly requested the union to return their respective cards.

4. As a result, I would have inquired into this issue in order to determine if there was a *prima facie* case of misrepresentation.

5. I am concerned that the above objectors may have been denied natural justice in this case as contemplated by the Divisional Court in the case of *Fullers Restaurants*, a decision dated March 11, 1980.

6. Furthermore, I believe that a secret ballot vote would have better served all parties in order to clearly determine majority support for the union or lack of same in the interest of good labour relations.

2616-94-U Labourers' International Union of North America, Local 183, Applicant v. Unit Park, Responding Party

Discharge - Just Cause - Unfair Labour Practice - Board finding that employer had just cause for discharging employee accused of breaching company ticketing and receipting procedures - Application dismissed

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *J. A. Rundle* and *Pauline R. Seville*.

APPEARANCES: *Mark Lewis* and *Leo D'Agostini* for the applicant; *Tim English*, *William Hudson* and *Lucas Catsiliras* for the responding party.

DECISION OF CHRISTOPHER ALBERTYN, VICE-CHAIR, AND BOARD MEMBER J. A. RUNDLE: February 14, 1995

The Issue

1. This is an application pursuant to the provisions of section 91 of the *Labour Relations Act*, in which the applicant trade union ("the Union") asserts that the responding party employer ("the Company") has violated section 81.2 of the Act by dismissing Mr. Yared Weldmariam ("the grievor") without just cause on September 21, 1994. The Union seeks the grievor's reinstatement and certain ancillary relief. The Company contends that it had just cause to discharge the grievor.

2. Section 81.2 of the Act reads,

81.2- (1) No employer, employers' organization or person acting on behalf of either shall discharge or discipline an employee without just cause if,

- (a) a trade union is certified as the employee's bargaining agent or the employer has voluntarily recognized the trade union as the employee's bargaining agent; and
- (b) no first contract agreement has been settled.

(2) If the Board determines that an employer has imposed a penalty on an employee for cause, the Board may substitute such lesser penalty as it considers just and reasonable in all the circumstances.

(3) If the employee is discharged during a probationary period described in the employment contract between the employer and the employee, the Board may apply a lesser standard for discharging the employee.

Facts

3. On April 20, 1994 the Union was certified to represent the Company's employees. A collective agreement was concluded between the Union and the Company on October 17, 1994 and ratified on October 18, effective from October 1, 1994 - after the date of discharge of the grievor.

4. The Company carries on business as a parking lot operator. It has several parking lots in Toronto, one of which is situated at the corner of Queen Street West and University Avenue. The grievor was employed as a parking lot attendant, working from that site.

5. The grievor commenced work for the Company during 1990. He worked for about 4

months. His job was cleaning the lots. On two or three occasions, when the regular parking attendant was absent, he substituted and worked as the parking attendant. He left to study and returned to the Company in June 1993. Initially the grievor's job was to flag down potential customers, urging them to park in the Company's lot. The grievor was employed by the Company on July 8, 1993 as a parking attendant. His full-time service for the Company was slightly more than 14 months at the time of his dismissal.

6. The grievor's duties required that he occupy the kiosk at the entrance to the parking lot, receive payment of the parking fee from customers wishing to park their cars in the lot, issue tickets and receipts, and perform certain related functions. He worked shifts.

7. The Company's lots accommodate three types of customers-monthly parkers who are issued a monthly sticker and who can come and go as they please, complimentary parkers, who are selected persons who have assisted the Company in its growth, and transient parkers, who are charged a fee for each occasion they park in a lot. This case concerns an incident involving a transient customer.

8. The Company has produced a document entitled "Attendant Responsibilities", which the Company contends applied to the grievor. The grievor was given a copy of the document upon his employment. It purports to describe all of the duties and responsibilities of the parking attendants in the Company's employment. The first rule of the document, the only one printed in bold type, reads as follows:

All cars parked on the parking lot will have a valid monthly sticker or a current ticket which has been properly time stamped and has the licence number filled out on the ticket. Any variance from this rule is cause for immediate termination of employment.

9. The document, including the rule, is repeated without alteration in the first collective agreement concluded between the Union and the Company in Appendix B thereof. That appendix relates to the provisions of Article 29 - "Discharge and Discipline" of the agreement, which reads,

The Company and the employees shall be bound by the provisions related to discharge and discipline and job descriptions for the employees as provided in Appendix B attached hereto and forming part of this Agreement.

10. The document describes the procedure to be followed by a parking attendant when a transient customer enters the lot. The gist of the instruction is as follows. The parking attendant must issue a yellow ticket to each transient customer when payment is initially made. The yellow ticket is perforated. One portion goes to the customer who places it on his/her car's dashboard to show that payment has been made, the other stays in the attendant's kiosk. The attendant writes the license number of the vehicle onto the portion s/he retains in the kiosk. The two portions of the yellow ticket are re-united when the customer leaves the lot. The attendant staples the two parts together. If any refund is due to the customer, payment is made upon the customer's return of the yellow ticket and his/her exit from the lot.

11. The grievor does not dispute this description of what was expected of him. However he denies that he received proper training in his duties when he was employed. He says that he received about 5 minutes training on the job.

12. Nonetheless the grievor seems to have understood what was required of him by management. Barring minor incidents, which are described below, the grievor performed his duties properly for more than a year prior to the occasion giving rise to this case.

13. The parking attendants are the custodians of the Company's income from transient parkers at its various lots. They collect and hold the money received from users of the lots for the duration of their shifts. They work alone, but for random audits by the Company's supervisors and a visit from the supervisor at the end of each shift to receive the cash collected during the shift. The random audits occur, on average, once every 2 days at each lot.

14. At the end of each shift the attendant prepares a document entitled, Daily Parking Report (DPR), by entering the shift (first, second or third), the attendant's time-in, his/her time-out, the lot number, the date, the lot name, the attendant's full name and his/her company number. The report contains information concerning the number of vehicles parked in the lot during the shift, the amount of money collected by the attendant and certain other details. The "Attendant Responsibilities" document describes what information should be entered by the attendant at the close of his/her shift:

Hourly Tickets

- All tickets to be separated in bundles by value. Tickets are then listed on the DPR with the lowest value first and the highest value last.
- Total the number of tickets. Total the value of each group of tickets an[d] enter these figures in section A of the Daily Parking Report (DPR). Note: Each ticket has a maximum value. Do not enter them in this section of the DPR.

Maximum Tickets

- Enter all tickets collected that are at the maximum rate.
- Enter the total number of tickets and the total value of the tickets in the area marked B.

Flat Rate:

- Each of our lots has a flat rate given for evening parking or for special event parking. All tickets for the flat rate value are to be entered in area C.

.....

[certain other matters are described which are not relevant to this application]

Next shift opening ticket:

- When you finish your shift, you will take the number of the next ticket that will be issued on the next shift and enter that ticket number on the DPR where it reads 'Next Shift Opening Ticket'.

First ticket issued:

- Enter the number of the first ticket that you issued at the beginning of your shift in this area.

Tickets issued:

- the first ticket issued from the next shift ticket. This number will give you the total number of tickets issued during your shift.

Tickets left for next shift:

- tickets that have not gone past the day maximum rate and cars that are still on the lot

will be transferred to the next shift for that date. Enter the total number of the tickets that area [sic] being transferred here.

- When complete, separate the two copies of the DPR and:
- The top copy is stapled to a duplicate deposit slip
- The second copy is wrapped around the used tickets from the shift and secured with a rubber band.
- The Supervisors will collect the two copies of the DPR and all used tickets.

15. These are complex instructions. The grievor completed the daily parking record forms properly, as appeared from the record submitted as an exhibit.

16. The Queen Street lot, where the grievor was stationed, is attended on two shifts each day: between 07h00 and 15h00 and from 15h00 to 23h00. The lot is unattended between 23h00 and 07h00 and there is no barrier to cars gaining unlawful access to the lot during those hours.

17. The incident giving rise to the grievor's discharge occurred on September 14, 1994. There are two contradictory versions of what occurred-the version of a customer, Mr. Trevor Williams, and that of the grievor. We describe in what respects their versions differ.

18. The grievor was on duty on the second shift (3 p.m. to 11 p.m.). After 6 p.m. a flat rate of \$5 was charged to transient parkers.

19. Mr. Williams lives in Pickering. He is a sales executive with a wholesaler-retailer. He travels to Toronto in the course of his employment about once every two weeks. He has no clients in the vicinity of the Queen Street lot where the grievor worked.

20. During the evening of Wednesday, September 14, 1994 Mr. Williams travelled with his fiancée and her brother to visit his fiancée's sister, who was staying for a few days in Toronto at the Hilton Hotel, opposite the Queen Street lot.

21. Mr. Williams cannot recall ever having parked at the Company's Queen Street lot before September 14, 1994.

22. There is a dispute between the parties as to when Mr. Williams arrived at the lot. Mr. Williams claims that he came to the lot at about 22h30, when the grievor was still on duty. The grievor denies seeing Mr. Williams at all that night. Mr. Williams remembers seeing the grievor that night.

23. Mr. Williams remembers the time of arrival because, after leaving the parking lot and paying \$5, described in the next paragraph, he went across the street to meet his fiancée's sister, and after greetings and brief conversation, they proceeded to the lobby to take advantage of the hotel's complimentary drinks which were available until 11 p.m. They discovered that the drinks offer had ceased prematurely, although it was only 22h55, ostensibly 5 minutes before closing time. Mr. Williams remembers this because his fiancée's sister complained to the hotel management of the early closing.

24. Mr. Williams claims that he drove into the parking lot and proceeded to the attendant's booth where the grievor was on duty. Mr. Williams says that he paid the flat rate of \$5 to the grievor. The grievor issued a receipt to Mr. Williams for the \$5 payment. The grievor admits that the "\$5" written on the receipt is in his handwriting. The receipt was produced at the hearing. It is

not dated. The grievor acknowledged that his usual practice was to date-and time-stamp each receipt, but he explained the absence of a date and time stamp on Mr. Williams's receipt as follows. At times the date - and time-stamping machine did not work well on the flimsy receipts-they crumpled in the machine-and when he was extremely busy he could not spend time trying to date-stamp the receipt. He would, in such circumstances, issue the receipt unstamped.

25. The grievor's lot was particularly quiet on September 14. There was no evidence of how busy it was on the following day. In the normal course an employee would receive a written warning for issuing a receipt without the date and time stamped on it. There is, however, no reference to such a rule in the Company's written record of the attendants' obligations.

26. The white receipts issued by the Company are the same receipts issued in all of its lots.

27. Mr. Williams recalls that he probably asked for the receipt because he tends to ask for receipts and keep them for his expense record. Mr. Williams says that he asked the grievor whether he needed any other ticket and the grievor told him that the receipt was all he needed. Mr. Williams says that he put the receipt into his pocket and then joined his fiancée and her brother who were meeting his fiancée's sister at the hotel across the road from the lot.

28. The Union and the grievor's version of events is that Mr. Williams arrived at the parking lot after 23h00, when the grievor's shift had ended, he had cashed up and left the premises. On this version, Mr. Williams parked his car in the lot unlawfully when it was unattended, after 11 p.m.

29. Mr. Williams says that he and his companions visited his fiancée's sister for about an hour to an hour and a half. When they returned to the parking lot they discovered that Mr. Williams's car was no longer there. Mr. Williams found a telephone number posted on the lot for use in the event of an emergency. He telephoned the number, to discover that his car had been towed away. He was given details of the location of the tow-away company where his car was being held. He says that he reached for paper in his pocket to note down the name of the tow-away company, its street address and directions to get there. He took out the receipt he had been issued by the grievor and he wrote those details in the blank spaces between the text of the printed receipt.

30. Mr. Williams's notation on the back of the receipt is consistent with the writing of someone hurriedly taking down information on a scrap of paper whilst receiving that information by telephone. It traverses the edge of the receipt in different directions and it appears between the lines of text in the body of the rear portion of the receipt, as if Mr. Williams was using to the full what little blank space there was.

31. The Union and the grievor's case is that Mr. Williams's entry on the back of the receipt was not made on the night Mr. Williams's car was towed away, but must have been made subsequently. The Applicant sought to suggest that Mr. Williams surreptitiously made the awkward entry on the receipt after the event so as falsely to suggest that he had paid for his use of the parking lot, when in fact he had not. Mr. Williams purportedly did this in order to try to re-claim his expenses, incurred when obtaining release of his vehicle, from the Company.

32. Mr. Williams and his companions took a cab to the towing company's premises. He inquired why his vehicle had been towed, but he was not given any information. He was obliged to pay \$85 to get his car released and he later paid a \$30 fine. Mr. Williams was inconvenienced for some hours and he arrived home in Pickering at approximately 3.30 a.m.

33. The towing of Mr. Williams's vehicle was pure coincidence-the result of an error by the

towing company, which error is now the subject of a dispute between it and the Company. Two vehicles were parked illegally in the Company's Bathurst Street lot. An official of the Company contacted the towing company and instructed it to tow away the two vehicles in the Bathurst Street lot. The tagging enforcement officer misunderstood his mandate and over zealously set about fining and towing away vehicles parked in any of the Company's lots. The result was that 23 vehicles in all were towed away, of which only 2 tow-aways were authorized by the Company. The towing company unlawfully towed away 21 vehicles, Mr. Williams's car and 20 other cars: either monthly parkers or vehicles parked by arrangement with the Company and, in one case, a vehicle which did not appear to have a ticket-the driver had mistakenly put the ticket in his pocket, rather than on the dash. Had Mr. Williams's car not been erroneously towed away this case would not have arisen because the Company would not have known of Mr. Williams's allegation that he paid \$5 to the grievor on the night of September, 14.

34. First thing the next morning Mr. Williams telephoned the Company and left an angry message on the Company's voice mail inquiring why his vehicle had been towed away when he had paid the \$5 flat rate required of him.

35. The Company's General Manager, Mr. Hudson, telephoned Mr. Williams in response to his message. Mr. Williams described the receipt in his possession, which satisfied Mr. Hudson that the receipt was one issued by the Company. Mr. Williams gave Mr. Hudson his car license plate details, which Mr. Hudson had Mr. Catsiliras, the Company's Operations Manager, verify against the list he had obtained from the towing company. Mr. Williams demanded a refund of the towing fee and fine for which he was liable. Mr. Hudson undertook to investigate the matter and revert to him. Mr. Hudson asked Mr. Williams to let him have a copy of the receipt in his possession, which Mr. Williams undertook to send. Mr. Williams explained that he would be on the road for the next few days, and not be in his office in Pickering, so he would fax the receipt to Mr. Hudson a few days later when he was back in his office. Mr. Hudson accepted this.

36. Mr. Williams did not have immediate access to a fax because of the travelling requirements of his job. He faxed a copy of the front and back of the receipt to Mr. Hudson approximately 3 days after the telephone conversation, when Mr. Williams was back at his office.

37. Mr. Catsiliras testified that he spoke to the grievor on Thursday, September 15 and he advised the grievor that a customer who had parked at the grievor's lot on the previous night, and whose car had been towed away, claimed to have paid \$5 to the grievor. The grievor denied receiving any money from a customer which he did not record on the daily parking report.

38. When the Company received the receipt from Mr. Williams, Mr. Catsiliras took it and showed it to the grievor. The grievor admitted issuing the receipt, but he could not recall when he had done so. At the hearing the grievor said that he had issued the receipt to Mr. Williams on Thursday, September 15, and not the night before, when Mr. Williams's vehicle was towed away.

39. If the grievor's version of events is to be believed-that the receipt (with "\$5" written on it by the grievor) was issued to Mr. Williams only on the following night (September 15) - then Mr. Williams must have had an identical receipt in his possession from some unspecified previous occasion, which he had with him when Mr. Hudson telephoned him, and which he was able to describe accurately to Mr. Hudson's satisfaction.

40. Mr. Catsiliras and Mr. Hudson both checked the grievor's daily parking report for his 3 p.m. - 11 p.m. shift on September 14. That report, which appears to be properly completed, recorded details of the various tickets issued by the grievor during his shift. Each ticket issued is attached to the daily shift report. No ticket was submitted to the Company by the grievor in respect

of Mr. Williams's car. No ticket had the license plate number of Mr. Williams's car. This meant that, if Mr. Williams is to be believed, the grievor issued a white receipt to him-no record is kept by the Company or by the lot attendant of the white receipts issued-without issuing a yellow ticket with his vehicle license plate number written onto it. Thus it appeared to Mr. Hudson that the grievor had received \$5 from Mr. Williams but he had not recorded his receipt of that amount, nor made payment of it to the Company.

41. The grievor was familiar with the proper procedure because his daily parking report form is ostensibly properly completed, the total amount of money collected matches the amount he paid to his supervisor at the end of his shift and the tickets attached to the report record the licence numbers of the vehicles recorded in the form. Nothing in the form would reveal the presence of Mr. Williams's vehicle in the lot. Were it not for the fact that Mr. Williams's vehicle was erroneously towed away that night, its presence on the lot would not have been traceable.

42. Mr. Williams visited the lot again the following day, Thursday, September 15, 1994. He claims he did so fortuitously. He and his fiancée were again visiting her sister during her brief visit to Toronto and Mr. Williams again parked in the Company's lot because of its convenient location directly opposite the hotel. On this occasion he was issued the proper yellow ticket and, as far as Mr. Williams can recall, a white receipt. Although Mr. Williams remembers speaking to the attendant-who was the grievor-mentioning that his car had been towed away the previous night and that he wanted to be refunded what it had cost him, at the hearing he could not recall whether the attendant was the grievor.

43. The grievor's recollection of Mr. Williams's visit to the lot on September 15 is that Mr. Williams mentioned that he had paid for parking the previous night and he wanted to be refunded. The grievor testified that he had asked Mr. Williams to produce his receipt, which he had refused to do. Mr. Williams said that he was in a hurry and he left. This version was not put to Mr. Williams when he was cross-examined.

44. Mr. Williams did not produce the receipt he received on the second night (Thursday, September 15) at the hearing. The existence of a receipt for the night of September 15 was not put in issue in the pleadings before the Board. Mr. Williams could not say whether he retained that receipt. When pressed in cross-examination, Mr. Williams speculated that perhaps he had not kept the receipt because he had been given a yellow ticket, which he had visibly placed on the dashboard of his car, and perhaps he had thought it unnecessary to keep the receipt. There was proof of payment in the display of the yellow ticket, so he did not need to keep the receipt.

45. Mr. Williams's fiancée and her brother were not subpoenaed to testify. Mr. Hudson explained their absence on the basis that although they were probably available to testify, they, like Mr. Williams, were not employees of the Company and the Company was reluctant to inconvenience them and Mr. Williams any more than was strictly necessary. Mr. Hudson decided not to subpoena Mr. Williams's fiancée because he thought that she could not add anything to the evidence of Mr. Williams. Mr. Hudson learned of the presence of Mr. Williams's fiancée's brother only at the hearing, so he had not previously considered the matter of issuing a subpoena to him.

46. The Union accepted that it is necessary for the Company to have proper control over the receipt and custody of the cash received from customers. The Union also accepted that if the Company's customers are seriously inconvenienced, that may have an impact upon the Company's relationship with its lessor, the Ontario government, and upon its future tender prospects. The Company's evidence was that Mr. Williams had been seriously inconvenienced by the wrongful towing away of his car; something which would not have occurred, on the Company's version, had the grievor complied with the correct ticket issuing procedure.

47. The grievor testified that he was informed by the Company's Operations Manager, Mr. Catsiliras, during the afternoon of Thursday, September 15 that Mr. Williams would be coming to the Queen Street lot that night. This evidence was not put to Mr. Williams, nor to Mr. Catsiliras, nor to Mr. Hudson during their respective cross-examination, and there was no satisfactory explanation given as to why they were not asked of this. Mr. Catsiliras never spoke to Mr. Williams at all on Thursday, September 15. The only contact between the Company and Mr. Williams on that day was the telephone conversation between Mr. Hudson and Mr. Williams, during which call no mention was made of any further visit to the lot by Mr. Williams. There is no way in which Mr. Catsiliras could have known that Mr. Williams would be coming to the lot that night, and therefore no way in which the grievor might have known that or been told that by Mr. Catsiliras. Mr. Williams himself said that he parked fortuitously in the lot that night because of its convenient location opposite the Hilton Hotel. He had not planned to do so in advance of arriving there.

48. During the latter part of 1993 the Company discovered substantial fraud and theft by a number of its employees and supervisors who were not complying with the Company's rules for the proper issue of tickets. Those who were party to the misappropriation of money collected, 17 employees and 4 supervisors, were all dismissed from the Company's employment. Mr. Hudson described another incident in which the rule was strictly applied: an attendant was discharged when a spot audit revealed that a car was parked in his lot without a ticket or a monthly sticker having been issued. The consistent practice applied by the Company is that any departure from its ticket issuing procedures results in an employee's dismissal.

49. Mr. Hudson reached the conclusion that the grievor had breached the Company rule that "all cars parked on the parking lot will have a valid monthly sticker or a current ticket which has been properly time stamped and has the licence number filled out on the ticket." The rule states that "any variance from this rule is cause for immediate termination of employment". Mr. Hudson sought an explanation from the grievor. The grievor denied that he had received any money from Mr. Williams on Wednesday, September 14. He denied that he had allowed any vehicle to enter the lot without his issuing a yellow ticket. Mr. Hudson did not believe the grievor and he terminated the grievor's employment by letter dated September 21, 1994. Mr. Hudson testified that he would have made the same decision even if the grievor had a clear disciplinary record. The grievor received the letter on September 23.

50. Mr. Catsiliras was under the impression that the grievor had been discharged for theft. Mr. Hudson said that the grievor may have stolen the \$5 paid by Mr. Williams, but that was not the cause of his discharge. Mr. Hudson explained that the grievor had been discharged for breach of the company rules concerning the proper handling of money received and the issue of tickets and receipts.

51. The grievor has three previous written warnings. None is related to the circumstances giving rise to his discharge. The first, issued on December 15, 1993, concerns the mistaken overcharging of a customer. There was no suggestion of dishonesty by the grievor. The second, on June 15, 1994, concerns the failure by the grievor to wear the proper attire expected of the Company's lot attendants. The third, of July 7, 1994, concerns the failure of the grievor to attend a compulsory staff meeting of all of the Company's lot attendants.

The Company's Argument

52. The Company submitted that the standard of fairness to be applied in determining "just cause" was that applied in arbitral jurisprudence.

53. The Company argued that it was not necessary for it to prove theft by the grievor. It

was sufficient for it to establish breach of its important rule that employees comply with the ticket issuing and money collection procedures. The stipulated sanction for breach of that rule is dismissal, which has been confirmed in the collective agreement between the Company and the Union.

54. The Company submitted that the proper test to be applied was that it establish the grievor's misconduct on a preponderance of probabilities, which, it argued, it had done.

55. The Company contended that dismissal was the appropriate sanction for the grievor's misconduct. Dismissal was stipulated as the sanction in the Company's "Attendants' Responsibilities" manual, and it was the agreed sanction in the Collective Agreement now concluded with the Union. It was the sanction previously applied by the Company in comparable circumstances.

56. The Company cited authority in support of the notions that management has the right to set the rules and policies which will apply to the employees of the enterprise, and that management can impose appropriate discipline pursuant to a policy which is informed by business rationale.

The Union's Argument

57. The Union agreed with the Company's submission that the test of fairness to be applied in determining "just cause" was that applied in arbitral jurisprudence. The Union accepted also that management has the right to set appropriate work and disciplinary standards and to apply fair discipline.

58. The Union argued that the grievor's previous discipline should not be taken into account because the previous written warnings are not relevant to a consideration of the issues in this case. Also, the Union submitted, it was clear from the evidence that management did not take the grievor's previous discipline into account when deciding to dismiss him.

59. The Union submitted that the real issue at stake in this case was whether or not the grievor had stolen \$5, which Mr. Williams alleged he had paid to him. The case essentially concerns whether the grievor deliberately took money from Mr. Williams which he did not pay over to the Company. Because the case concerns a substantive allegation of theft against the grievor, the nature of the Company's onus is to meet the highest level of the balance of probabilities test. That is the appropriate test in determining whether quasi-criminal conduct has occurred, or not, viz. the Company should prove its case by clear, convincing and cogent evidence. The Union referred to the following authority for the application of this higher standard, *Re Tank Transport Ltd. and Teamsters Union, Local 880*, 34 L.A.C. (3d) 242 (MacDowell), at 249; *Re Loblaw's Supermarkets Ltd. and United Food & Commercial Workers, Local 1000A*, 10 L.A.C. (4th) 425 (Thorne), at 435 and *United Food & Commercial Workers International Union, Local 617P and Better Beef Ltd. and Kenneth C. Musgrave*, Ont. Ct. (Gen. Div.) March 7, 1994 Court File No. 299/93 (Then, Dunnet and Adams JJ.) in which the court confirmed this test, as follows:

The discharge of an employee for theft is a serious matter which required .. proof of facts on a balance of probabilities, at the high end of the range. Accordingly, the proof required must be clear and cogent.

60. The Union submitted that an adverse inference should be drawn from the Company's failure to subpoena Mr. Williams's fiancée and her brother. They were available and their evidence was important because it would have addressed the critical issue of the time of arrival at the parking lot of Mr. Williams and his party on Wednesday night, September 14. They could have corroborated or damaged the evidence of Mr. Williams. The Union's counsel relied upon the Board's

decision in *Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers v. Charterways Transport Limited*, [1982] OLRB Rep. Apr. 552, at 554 par. 9 in which the Board drew an adverse inference from the absence of a particular witness.

61. The Union pointed to certain incongruities in Mr. Williams's evidence. He did not produce the receipt he said that he probably received from the grievor on Thursday, September 15. He could not recall seeing the grievor on that night, although he could remember seeing him on the previous night, and despite Mr. Williams's evidence that his conversation with the grievor on the 15th was longer than that on the 14th. Mr. Williams did not immediately let the Company have the receipt in his possession-it was some days before he faxed it to the Company. The Union suggested that Mr. Williams's explanation for the delay was not convincing.

62. The Union submitted that if the Board disbelieves the grievor, and prefers Mr. Williams's version of events, that the evidence suggests that the grievor was not adequately trained in, and informed of, the procedures to be applied as regards the issue of receipts. His lack of knowledge of the procedures should mitigate any sanction for his misconduct.

63. The Union argued that an election had to be made between the evidence of Mr. Williams and the grievor and, at best for the Company, Mr. Williams's evidence did not pass the high test described above. In the result, the Company had not discharged the onus.

Decision

64. We accept the Union's submission that the grievor's previous discipline should not influence our assessment of the grievor's conduct in this case. Our reasons for this conclusion are that the previous incidents, for which the grievor was disciplined, are not related to the matters at issue in this case and management did not rely upon the previous warnings when they decided to discharge the grievor.

65. There are two possible versions. Either Mr. Williams has fabricated his version of events, or the grievor has. The two versions are mutually inconsistent. If Mr. Williams fabricated his version and if the grievor is to be believed, then the following circumstances necessarily obtain:

Mr. Williams parked after 11 p.m. in the Queen Street lot on Wednesday, September 14, 1994;

Mr. Williams must have decided between the time he retrieved his car from the towing company and his early morning phone-call to the Company on Thursday, September 15, that he intended to pretend that the attendant on duty on the night of September 14 had issued a receipt to him. He would thereby illicitly recover the towing charges from, and defraud, the Company;

Mr. Williams must have had a Company receipt in his possession at the time he was telephoned by Mr. Hudson of the Company during the following morning, Thursday, September 15, 1994 so that he could accurately describe it to him;

Mr. Williams must have deliberately parked in the Queen Street lot on Thursday, September 15 for the purpose of obtaining a receipt from the grievor, signed by him, so that he could incriminate the grievor by using that receipt to suggest that he had paid for his parking the previous night;

Mr. Williams must have taken a chance that the attendant who signed his receipt on September 15 (the grievor) was the person on duty the previous night;

Mr. Williams must have ensured that the grievor did not follow his usual procedure of date-and time-stamping the receipts he issued, so that he (Mr. Williams) could later pretend that he had received the receipt on September 14, and not on September 15, and the grievor must have conveniently obliged him even although he was not busy at the time;

Mr. Williams must then have copied the information concerning the location of the towing company onto the back of the receipt signed by the grievor in such a form that it appeared to resemble his writing in circumstances of hurriedly scribbling down the information while holding a telephone in one hand;

Mr. Williams went to such elaborate subterfuge in order to save himself the \$85 towing fee and the \$30 fine, risking in the process an allegation of fraud against the Company for falsely seeking to extort money not lawfully due to him.

66. The alternative explanation is that the grievor has fabricated his version in order to plead his innocence to the Company's accusation of misconduct. If the grievor fabricated his version, then he received \$5 from Mr. Williams before 23h00 on the night of Wednesday, September 14, 1994, but he failed to declare that amount to his employer. The risk he took was that no random audit would be conducted by management in the relatively short period of time before the close of his shift.

67. In making a decision as to the relative probability of conflicting versions we ask three related questions: What are the proven facts ? What are the reasonable inferences to be drawn from those facts? Are those the only reasonable inferences to be drawn from the facts?

68. The proven facts are the following: the grievor issued an undated receipt to Mr. Williams; Mr. Williams's car was towed away on the night of September, 14, 1994; Mr. Williams telephoned the Company early on September 15 to complain that he had paid \$5 for his parking in the Company's Queen Street lot, but his car had nonetheless been towed; during the day on September 15 Mr. Williams had a company receipt in his position which he was able to describe accurately; the Company had no record of Mr. Williams's car parking in its lot on the night of September, 14, but it did have a record of his car being towed from there that night; the grievor did not account to the Company for any money received from Mr. Williams on the night of September 14; Mr. Williams parked in the Company's lot on September 15 and he did not produce a separate receipt in respect of that occasion.

69. We find that the only reasonable inference to draw from the facts is that Mr. Williams parked in the Company's Queen Street lot on Wednesday, September 14 and that he paid \$5 to the grievor, which the grievor did not include in the cash he paid to his supervisor at the end of his shift on that day.

70. We find that the grievor's version is a possible inference to draw from the facts, but it is so unreasonable and so improbable as to be entirely unbelievable.

71. The only danger which the grievor faced by taking Mr. Williams's money, and not prop-

erly accounting for it, was that a random management audit might occur before the close of his shift. But, given that the random audits occurred on average once every two days (or once every fourth shift at the grievor's lot), that risk was not enormous. The grievor could not reasonably have anticipated that Mr. Williams's car would be unlawfully towed from the lot because a tagging enforcement officer was to exceed his authority. We find that the grievor took the reasonable chance that he would not be discovered if he did not properly account for the \$5 he had received from Mr. Williams.

72. The grievor's version is also contradictory. He testified that when Mr. Williams's visited the lot on September 15, Mr. Williams mentioned that he had paid for parking the previous night and that he wanted his money back. The grievor asked Mr. Williams to produce his receipt, which he refused to do. According to the grievor, Mr. Williams said that he was in a hurry and he left.

73. That version of what occurred on September 15 is entirely inconsistent with the thrust of the grievor's case. His case depends upon Mr. Williams's subterfuge, his devious endeavour to wheedle a receipt, without a date and time stamp, from the grievor, with the grievor's signature upon it. Mr. Williams could not have obtained such a receipt from the grievor had he conversed with the grievor in the manner attested to by the grievor.

74. Had the grievor forgotten to issue a ticket to Mr. Williams, but recorded the \$5 which Mr. Williams claims he paid to the grievor, then the grievor's daily parking report would have shown an overage of \$5. The absence of any overage suggests that the grievor kept the \$5.

75. There were some problematic features in Mr. Williams's evidence. He readily recognized the grievor when he saw him shortly prior to the commencement of the hearing, yet he remembered the grievor only from the first night he parked in the lot (Wednesday, September 14) and not from the next night. Mr. Williams could not explain this anomaly. Mr. Williams did not produce at the hearing the receipt given to him by the grievor on the second night. When pressed as to why he did not produce it, he thought that he had perhaps not kept it. He explained the receipt's absence on the basis that he had been issued the yellow ticket, so he speculated in hindsight, and perhaps he had concluded that he did not need to retain the receipt.

76. In our view no adverse inference should be drawn from Mr. Williams's failure to produce the second receipt. It was not in issue in the parties' pleadings and, as a subpoenaed witness, he had no reason to endeavour to trace that receipt when questions of its existence were raised for the first time at the hearing.

77. Our impression of Mr. Williams is that he was an honest witness. He was frank about what he could, and could not, recall. His failure to recall seeing the grievor on the second night he parked in the lot does not suggest that he is a dishonest witness. Memory recollection is often dispersed and impressionistic. The failure to remember particular details, even obvious detail, does not necessarily detract from an honest endeavour by a witness to describe a particular occurrence or set of occurrences. The receipt Mr. Williams claims to have been given to him on Wednesday, September 14 was important to him—it was his proof of payment on that night; it also had the details he had written of the location of the tow-away company. The receipt of the next night was of no particular significance to him. He may or may not have retained it. His failure to produce it at the hearing does not, in our view, detract from the overall credibility of his testimony. Thus, we find that the anomalies or gaps in Mr. Williams's evidence do not lead us to the conclusion that he was a dishonest or untrustworthy witness.

78. We do not draw an adverse inference from the failure by the Company to subpoena Mr. Williams's fiancée and her brother. We accept the conclusion drawn in the *Charterways Transport*

Limited case referred to above, but the facts in that case are distinguishable. In that case there was no explanation given why the crucial corroborating witness was not called. Here Mr. Hudson explained why it was that he had decided not to call Mr. Williams's fiancée. We accept that explanation. The presence of Mr. Williams's fiancée's brother in Mr. Williams's car became apparent to Mr. Hudson only at the hearing. The Company had not called him because it was unaware of his presence in Mr. Williams's car. No adverse inference can be drawn from the Company's failure to call Mr. Williams's companions.

79. The grievor's evidence was that he always date - and time-stamped receipts he issued unless he was extremely busy and the stamping machine was causing him difficulty. The evidence was that the parking lot was extremely quiet on the night of September 14. There was no lack of knowledge on the grievor's part as regards the issue of receipts. In fact, his paper work was exemplary. He plainly understood, and generally applied, the Company's ticketing and receipting procedures. We find that he chose not to date - and time-stamp the receipt on the night of September 14.

80. The Union insists that, if we are to find in favour of the Company, we must determine that the grievor committed an act of theft. We do not consider that to be necessary because that is not the reason why the grievor was discharged by the Company. The Company discharged the grievor for breach of its principal rule, which reads as follows:

All cars parked on the parking lot will have a valid monthly sticker or a current ticket which has been properly time stamped and has the licence number filled out on the ticket. Any variance from this rule is cause for immediate termination of employment.

81. We find, on clear, convincing and cogent evidence, that the grievor breached this rule and that he did so intentionally.

82. We have considered whether a lesser penalty than termination of the grievor's employment is appropriate. The amount of money involved is small. However the grievor is employed in a position of trust-he is the collector and custodian of the Company's income. He works alone and his principal responsibility is to collect cash for the Company and to account properly for the amounts received by him. His breach of that fiduciary duty to the Company goes to the root of the employment relationship. His misconduct destroys the trust between him and the Company which is an essential feature of his employment. There is accordingly no reasonable prospect of a normal employment relationship being restored between him and the Company.

83. The grievor's seniority is relatively short and accordingly does not influence us to a factor which might mitigate the severity of the discipline imposed upon him.

84. Hence we find that there are no circumstances which persuade us that a lesser penalty than termination is appropriate.

85. In the circumstances we find that the Company had just cause to discharge the grievor. The application is dismissed.

DECISION OF BOARD MEMBER PAULINE R. SEVILLE; February 14, 1995

1. I dissent from the decision of my colleagues. With respect, I am unable to agree with either their credibility assessment or their legal analysis. The case law requires that a high standard of proof be met before an employer is justified in disciplining an employee for a quasi-criminal offence such as is at issue in these proceedings. Given the numerous inconsistencies in the testi-

mony of the employer's main witness, Mr. Williams, and the credible testimony of Mr. Weldmariam, I feel that this test has not been met in this case.

2. As a preliminary matter, it should be noted that the relevance of arbitral concepts to determinations of just cause under section 81.2 is still unclear at this stage (*The Brick Warehouse Corp.*, [1993] OLRB Rep. Nov. 1206 at 1210). Nevertheless, in the instant case, both parties agreed that the relevant test of fairness is that which is applied in the arbitral jurisprudence. As well, the majority has dealt with the case on this footing and I propose to do the same.

3. The majority has found that Mr. Weldmariam was not discharged because of theft, but rather for a breach of a rule: namely, that parking lot attendants must issue a yellow ticket - which has been properly time stamped and has the license number filled out on the ticket. The significance of this finding is that the employer is to be held to the balance of probabilities standard of review — rather than the quasi-criminal standard discussed above.

4. While the employer thus argued that Mr. Weldmariam was disciplined for violation of a rule, I find this argument unconvincing and overly semantical. Clearly, the employer was not concerned with the technical violation of a rule. Its real and substantial concern was that Mr. Weldmariam allegedly stole five dollars. This is clear from the evidence the company led, which established its vulnerability to theft from employees: namely, that it has in the past been the victim of theft by employees. Indeed, on one occasion, it fired as many as 21 employees, including 4 supervisors for theft.

5. The offence that Mr. Weldmariam was disciplined for is a serious one. Even beyond the impact it will have on Mr. Weldmariam's livelihood and future employment opportunities, it will also impact on his good name and reputation. Indeed, an accusation of theft carries great social stigma. As Professor Laskin, as he then was, stated in *Re U.E., Local 524 & C.G.E. Co.* (Peterborough) (1949), 1 L.A.C. 320 at 320 (Ont.):

"There can be no graver charge of misconduct in employment... ."

6. In recognition of the stigma associated with a discharge for alleged criminality, early arbitral jurisprudence held that the appropriate standard of review of "just cause" is the criminal one of "beyond a reasonable doubt", rather than the civil "balance of probabilities" standard (*Re U.E. & C.G.E., supra*, at 320-321; *Re U.M.W., Dist. 50 & Caldwell Linen Mills Ltd.*, (1960), 10 L.A.C. 356 (Little) at 363-364 (Ont.); *Re Federal Labour Union & Sunbeam Corp.*, (1956), 6 L.A.C. 136 (Osborne) (Ont.)). As W. Little stated in *Re U.M.W. & Caldwell Mines*:

"To decide otherwise would mean that an employee was for all intents and purposes being labelled as a criminal in the minds of those hearing of the incident without that degree of proof which our law says must be forthcoming... ."

7. The case law supporting a criminal standard was subsequently rejected in favour of the civil standard on the basis that an arbitration hearing is a civil, rather than a criminal, proceeding (*Re U.S.W.A. & Intl. Nickel Co.*, (1967), 18 L.A.C. 399 (Weatherill) at 400-402; *Re I.U.O.E., Local 796 & General Mills Cereals Ltd.*, (1964), 15 L.A.C. 116 (Reville) at 117-119; *Re U.S.W.A. & Intl. Nickel Co.*, (1965), 16 L.A.C. 239 (Lane) at 239-240; *Re Polymer Corp. & Oil, Chemical & Atomic Workers, Local 9-1,4* (1973), 4 L.A.C. (2d) 148 (Palmer) at 150-151 (Ont.); *Re Canada Packers Ltd. & Cdn. Food & Allied Workers*, (1974), 5 L.A.C. (2d) 371 (O'Shea) at 377 (Ont.)).

8. However, the notion still remained that allegations of theft or other criminality are more serious than other charges. Thus, the standard developed that where an employee is accused of a criminal offence the onus is on the employer to prove the charge on the highest level of the

balance of probabilities. The evidence required to justify the dismissal is variously described as substantial and reliable or clear, strong and cogent. Despite the particular words used to describe the evidence required, all arbitrators agree that it falls somewhere between the civil "balance of probabilities" and criminal "beyond a reasonable doubt".

9. The following cases support the "quasi-criminal" standard: *Re Fuel, Bus, Limousine, Petroleum Drivers & Allied Employees, Local 352 & Air Terminal Transport Ltd.*, (1970), 22 L.A.C. 143 (Brown) at 143-144; *Re Tank Truck Transport Ltd. & Teamsters Union, Local 880*, (1988), 34 L.A.C. (3d) 242 (MacDowell) at 249 (Ont.); *Re Canex Placer Ltd. & C.A.I.M.A.W.*, (1978), 18 L.A.C. (2d) 130 (Weiler) 133-135 (B.C.); *Re U.A.W. & Allen Industries Can. Ltd.*, (1971), 23 L.A.C. 121 (Weatherill) at 124; *U.F.C.W., Local 617P v. Better Beef Ltd.*, (7 March 1994), No. 299/93, at 3 (Ont. Div. Ct.); *Re Loblaw's Supermarkets Ltd. & U.F.C.W., Local 1000A*, (1990), 10 L.A.C. (4th) 425 (Thorne) at 432-435 (Ont.); *Re B.C. Telephone Co. & T.W.U.*, (1978), 18 L.A.C. (2d) 225 at 229-230; *Re Indusmin Ltd. & United Cement, Lime & Gypsum Workers Intl. Union, Local 488*, (1978), 20 L.A.C. (2d) 87 (Picher) at 89-90; *Re Toronto (Metropolitan) & C.U.P.E., Local 79*, (1992), 28 L.A.C. (4th) 160 (Gray) at 168-169.

10. In *Re Canex Placer Ltd.*, Professor Weiler explained the rationale for this higher level of scrutiny in the following terms:

...The reason we adopt this higher standard of proof in this limited context of criminal behavior, is that a discharge or discipline for "criminal cause" carries with it connotations of corruption, illegality, or moral turpitude not apparent in other cases of industrial discipline. Criminal cause involves a significant loss of reputation and the social effects and stigma of such a sanction places a permanent blot on the employee's record that is qualitatively different than in the context of a non-criminal discharge or discipline.

• • •

Arbitrators now recognize that a discharge on criminal charges (e.g., theft, assault) creates a much more significant impediment to that employee's being able to find other work than would be the case if that employee were discharged for absenteeism, insubordination, or sleeping on the job. (pp.134-135)

11. Having reference, then, to the high evidentiary test in the arbitral jurisprudence that is to be applied to allegations of theft, in my opinion, the test was not met in this case. I base this conclusion mainly on my credibility assessment of the two main witnesses, Mr. Weldmariam and Mr. Williams. 12. As M. G. Picher pointed out in *Re Indusmin Ltd.*, *supra*, the resolution of issues of credibility is often difficult in proceedings of this kind, especially where serious personal misconduct is alleged (p.47). However, the oral evidence conflicted and it was therefore necessary to assess the witnesses' credibility. In doing so, I have considered a number of factors, including the witness' opportunity to perceive, his or her perception, experiential capacity, memory, sincerity, and their ability to cause accurate verbal communication.

13. I found Mr. Weldmariam to be a credible witness. In giving evidence he appeared frank and forthright. Indeed, the evidence of the employer's own witnesses suggests that he has been open and sincere from the beginning of this dispute. For instance, upon being shown the receipt by his supervisor, he immediately offered that the "\$5" written on the receipt was in his own handwriting. Further, his story has been consistent throughout and was not significantly shaken despite thorough cross examination. In sum, there was nothing in Mr. Weldmariam's demeanour from which any negative inference may be drawn. On the other hand, there were a number of frailties in Mr. Williams' evidence:

- (i) It seems somewhat unusual that Mr. Williams, who testified that he

habitually asks for and retains receipts for expense purposes, did not retain his parking receipt for September 15, 1994. This is particularly odd in light of the considerable trouble he alleges that he was faced with on the previous night at the same parking lot. This trouble, to his mind, was ameliorated by the fact that he had received a yellow ticket for parking that night.

- (ii) Similarly, it is difficult to understand why someone as upset as Mr. Williams obviously was with the service he received at the lot (as evidenced by the angry message he left on the company's answering machine) would choose to park at the same lot the very next day.
- (iii) It is odd that, at the hearing, Mr. Williams readily recognized Mr. Weldmariam from September 14, but could not recognize him when he saw him on the 15th. This is especially odd since Williams talked to Weldmariam much longer on the 15th than on the 14th, and would have more reason to remember him given the events of the previous evening.
- (iv) Mr. Williams told Mr. Hudson, the employer's general manager, on September 15, 1994 that he could not bring the ticket to him because he was on the road on business, but yet he was at the parking lot and Hotel that very same day.
- (v) Mr. Weldmariam testified that on September 15 he asked Mr. Williams to produce the receipt he claimed to have had from the previous evening. Despite having spent considerable time discussing the matter with Mr. Weldmariam, when Mr. Weldmariam asked for the receipt, Mr. Williams refused to provide it, stating that he was in a rush and then hurried off. Mr. Williams must have still had the receipt at that time since, at that point, he had not yet sent it to the company.

14. The evidence before me does not solve the mystery of what exactly happened on the evening of September 14, 1994. However, as Nimal V. Dissanayake pointed out in *Re U.W.O. & C.U.P.E., Local 2361*, (1988), 35 L.A.C. (3d) 39 at 50 (Ont.), "solving the crime" is not the purpose of this proceeding. The issue is whether I can find on the basis of clear, convincing, and cogent evidence that the employer has established that the grievor stole five dollars. Having carefully considered the evidence, and bearing in mind that the allegations against the grievor involve serious criminal conduct, I cannot find that the employer has met its onus of proof. Accordingly, I find that Mr. Weldmariam's discharge was not for just cause.

1690-94-R National Automobile, aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Windsor Casino Limited, Responding Party

Bargaining Unit - Certification - Security Guards - Board finding that bargaining unit consisting solely of casino's surveillance staff constituting appropriate bargaining unit

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. H. Wightman* and *C. McDonald*.

APPEARANCES: *L. N. Gottheil*, *Maureen Kirincic*, *Mark Gallira* and *Chuck Cunningham* for the applicant; *Edward Ducharme*, *Paul Nesseth* and *Suellen Meloche* for the responding party.

DECISION OF THE BOARD; February 8, 1995

1. This is an application for certification in which the applicant requested the taking of a pre-hearing vote.
2. In a decision dated December 1, 1994, the Board (differently constituted) certified the applicant for all employees of Windsor Casino Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, promotion and marketing staff, office, clerical and sales staff, and pit clerks. In that decision, the Board also certified the applicant on an interim basis for all security guards employed by Windsor Casino Limited in the City of Windsor, save and except security sergeant and persons above the rank of security sergeant and, pending the resolution of a dispute over the bargaining unit, surveillance staff.
3. The applicant takes the position that surveillance staff should be included in the security guard bargaining unit. Windsor Casino Limited ("Windsor Casino") contends that a bargaining unit consisting solely of surveillance staff constitutes an appropriate bargaining unit. Windsor Casino argues that the surveillance staff does not have a community of interest with any other employee grouping, including security guards. It also takes the position, more importantly, that a potential and actual conflict of interest would exist if surveillance staff were included in a bargaining unit with security guards.
4. Windsor Casino called one witness to testify. At our urging, each counsel advised the Board of what in their view constituted the relevant facts. At the conclusion of this process, there were only a few matters in dispute. In determining the facts, the Board has carefully considered the oral and documentary evidence, and the facts conveyed by counsel, most of which were agreed.
5. As its name indicates, Windsor Casino operates a casino in the City of Windsor. The casino is currently operating in a temporary facility with three floors consisting of sixty thousand square feet and a basement area. The casino has a capacity of over four thousand customers and, on an average day, as many as twelve thousand customers will visit the casino. At any one time, there will be approximately three hundred and fifty employees working at the casino. Given the nature of its business, security is a vital aspect of Windsor Casino's operation. In general, the objective of the security operation is to protect Windsor Casino property, assets, customers and employees, to detect irregularities, to protect the reputation and goodwill of the casino and to ensure a safe, pleasant and comfortable environment for customers and employees. Windsor Casino employs approximately one hundred and fifty persons in its security department whom we will refer to as security guards. There are thirty-six security guards on each shift. Windsor Casino also employs approximately thirteen persons in its surveillance department. Although these per-

sons are also guards, we will refer to them as surveillance operators, which is their Windsor Casino classification, in order to distinguish the two groups of employees.

6. Security guards report to the director of security who in turn reports to the president of Windsor Casino. They work an 8½ hour day, are paid hourly and work rotating shifts. Security guards wear a uniform and work on the casino floor. It is their visibility which in a large part creates a positive security result. They are not restricted from securing other work at Windsor Casino since they are not considered to have sensitive information. When this application was made, security guards were prohibited from accepting gratuities. This policy changed approximately a month prior to the hearing.

7. The Security Department Manual provides that:

The primary mission of this department is to protect Casino Windsor property, guests and employees against theft, fraud and abuse; enforce Casino Windsor policies and regulations; perform gaming related activities; assist departments as directed or requested; perform non-gaming related duties; and, perform such other security services that ensure a safe, pleasant and comfortable environment for Casino Windsor guests, employees and their property.

This manual also provides the following broad general statement of the responsibility of a security officer:

The security officer is responsible for performing a wide range of casino related duties including the maintenance of public order, enforcement of safety rules and the protection of Windsor Casino Limited property and assets.

8. In practice, security guards patrol various zones inside the casino as well as monitor some exterior locations. Many of their responsibilities relate to casino customers. They ensure that minors are not allowed in the casino and they watch for thefts on the casino floor. If requested, a security guard would accompany a customer to the parking lot. They are involved in crowd control and provide general assistance to customers. Security guards deal with anyone who is intoxicated or causing a disturbance. They would be involved in the transportation of money and money equivalents. Since security guards receive only approximately three hours of instruction on games by the vice-president of casino operations, their focus is not on attempting to detect gaming irregularities. If a security guard did notice someone involved in a gaming offence, he or she would have an obligation to report it. Since their involvement is primarily with non-gaming offences, security guards maintain a regular contact with the Windsor Police Department. Security guards can exercise the common law power of arrest.

9. There is a security guard office on the main floor of the casino as well as security podiums on each floor. In order to meet their responsibilities, the security guards utilize video monitors. It appears, however, that the director of surveillance determines whether the security guards will have video capacity and to what extent.

10. Surveillance operators report to the director of surveillance who presently reports to the president of Windsor Casino. Once a board of directors is selected, the director of security will report directly to the board of directors. This line of authority is consistent with the fact that surveillance operators monitor all employees, including the president of Windsor Casino. Surveillance operators work an 8 hour day, are paid a salary and do not work rotating shifts. Although Windsor Casino considers the surveillance operators to be on salary, an hourly rate is utilized when paying certain items such as sick pay. Surveillance operators work in a locked room in the basement that has restricted access. They do not wear a uniform. Where it is important for security guards to be visible, the opposite is true for surveillance operators. They covertly monitor all casino activities

from an area separate and apart from customers and other employees. Surveillance operators are not permitted to move from their department to any other job in the casino. This policy is based on the concern that a former surveillance officer could easily defraud Windsor Casino. They possess very sensitive information which could be used to compromise the security system. Surveillance operators are prohibited from accepting gratuities.

11. The Surveillance Department Manual reefers generally to the objectives of the department as follows:

The objectives of the surveillance department function at Windsor is to covertly monitor all casino activities on the floor, and in support areas, including but not necessarily limited to: all games and in pits; slot areas; cage, cage office, and master bank; soft count room; and hard count room. The surveillance will consist of monitoring for cheating or stealing by players and employees, alone or in concert; the failure of employees to follow proper procedures; discovery of counters, disorderly persons, and persons on exclusion lists; arrest and convictions; and all movement of chips or cash on the casino floor.

The surveillance policy contained in the manual sets out the following rules:

The following rules must be read, understood and agreed to be adhered to by every operating employee of the surveillance department.

1. The surveillance department is separate and apart from all other departments. It is important we observe that separateness in both appearance and actuality. Contacts with dealers, casino supervisors, cage and count personnel, security employees and all other persons employed within the casino/hotel complex should be restricted to the extent that is practical. Contact with hotel and security personnel during the duty meal period should be cordial, but surveillance department operations and business should not be discussed. Any other contact with casino and hotel personnel should be restricted to official business only.
2. It is of paramount importance each employee acknowledges that all information, communication, reports, documents and incidents he/she is privy to during the course of his/her duties, is highly confidential and is on no account to leave the surveillance department.

Always be aware that thoughtless outside social conversation concerning the department and its activities can damage our function or may harm another person's reputation or livelihood.

Your performance in this regard will be closely scrutinized and where it is established that a member of the department had contravened this policy, it will be grounds for termination.

3. Surveillance department personnel are not permitted on the gaming floors of the casino outside normal working hours. When permission is obtained to visit the complex during off duty hours, surveillance staff are to limit their activities to areas not involved with gambling.

The security guards also have confidential obligations and there are limitations in their ability to deal with other employees and customers. However, those obligations and limitations are not nearly as extensive as those for surveillance operators.

12. In describing in general terms their functions, the Surveillance Department Manual indicates that a surveillance operator "reports to the surveillance supervisor, and is responsible for monitoring the activities of the casino floor (table games, cages, video machines, count rooms, etc.) utilizing the necessary surveillance equipment, forms, logs and filing systems". Surveillance operators receive over three hundred hours of intensive training in the operation and manipulation

of casino games. They also receive two weeks training in equipment, particularly the camera system. Surveillance operators are expected to have an in-depth understanding of the procedures in all areas. With this training and knowledge, they are equipped to protect the assets of the casino, including its integrity and reputation. As noted earlier, surveillance operators covertly monitor all casino activities in order to detect irregularities including criminal offences. They look for cheating at play, tampering with slots or fraud of any sort and are obliged to report them. As well, surveillance operators observe whether the proper procedures are utilized in various areas of the casino. The monitoring function is performed using sophisticated video and audio equipment. Some areas are monitored constantly, while other areas are monitored randomly. Surveillance operators have equipment which permits them to hear any conversation in the casino. Although their focus is on gaming activities, surveillance operators monitor employees closely, including security guards. There is some evidence to suggest that employees of a casino commit a higher percentage of offences than customers. Surveillance operators assemble and preserve evidence for purposes of prosecution in criminal offences. Video and other evidence is preserved by them with respect to offences and the failure of employees to follow proper procedures. For gaming offences, surveillance operators will deal with the O.P.P. They do not exercise the power of arrest.

13. Since both security guards and surveillance operators are engaged in security work, it is not surprising that there are some similarities and contact between the two groups. All employees including management receive the same benefit package. Both groups of employees, as well as other employees, can have their meals in the cafeteria in the casino. Windsor Casino pointed out that if this was a permanent facility, the surveillance operators would have their meals in a separate area from other employees. In order for both groups to perform their jobs, security guards and surveillance operators do maintain contact with each other. We do not purpose to detail all the circumstances in which these contacts might arise. Suffice it to say that a security guard encountering a problem would more than likely contact surveillance in order that the surveillance staff could monitor the situation as well. Such contacts would be made by phone or by means of a walkie talkie. Surveillance might also contact security if he or she notices a problem which security could become involved in. Security might require the use of tapes made by the surveillance staff. There are situations in which both groups of employees are involved in monitoring the same activity. If a customer has a big win, security guards and surveillance staff would be involved in monitoring the situation. When money or money equivalents are moved, the security guards will provide an escort while the surveillance staff will monitor the activity.

14. The submissions of both counsel were of considerable assistance to the panel. Although it does not do justice to their submissions, we propose merely to highlight their arguments.

15. Counsel for the applicant argued that security guards and surveillance operators share a community of interest. In counsel's view, Windsor Casino operates one security system in which the two groups of employees perform similar and inter-connected functions. Counsel emphasized those areas, such as the movement of money, where the two groups of employees, in effect, carry on a team effort. Both positions require that information be kept confidential and both groups have the same obligation to Windsor Casino. Counsel argued that the terms and conditions of both groups are not so different so as to cause serious labour relations harm if the two groups of employees were in the same bargaining unit. Counsel argued that any conflict of interest between the two groups was merely incidental. In any event, counsel argued that the self-monitoring of guards was not the type of conflict contemplated by sub-section 6(6) of the Act. Counsel argued that with sub-section 6(6) of the Act, the Legislature explicitly or by implication intended that there would be one unit of security guards. Counsel also argued that placing the surveillance operators in a separate unit would run counter to the Board's policy against fragmentation.

16. Counsel for Windsor Casino argued that the security guards and surveillance staff constitute one security system, but they are clearly two separate and distinct aspects of the security system. Counsel argued that the surveillance staff perform the highest level of security functions and that they monitor all activities in the casino, including the activities of security guards. The practice in the industry is to separate the two groups and this separation is critical to maintaining an effective security operation. Counsel referred to a number of differences in the terms and conditions of employment to illustrate that the two groups do not share a community of interest. Although there is some necessary functional coherence between the two groups, counsel argued that there is no meaningful interdependence between them. Counsel also emphasized that the conflict of interest that would exist if surveillance staff were in the same bargaining unit with other employees, including a bargaining unit of security guards. Part of their responsibility is to monitor security guards while the reverse is not the case. Counsel argued that a surveillance operator may have to testify in a criminal proceeding or perhaps in an arbitration proceeding concerning the failure of a security guard to meet his or her employment obligations. Counsel argued that sub-section 6(6) of the Act does not preclude a separate unit for surveillance but rather requires it. In addressing the fragmentation issue, counsel commented on the unique nature of this industry and particularly the significance of the security system. Counsel noted that this was not the traditional industrial context. Counsel argued that the circumstances here disclose that a smaller unit of surveillance staff is not only appropriate but necessary.

17. The parties provided us with the following cases: *International Hod Carriers' Building and Common Labourers' Union of America and Geo. A. Crain & Sons Ltd. et. al.*, [1963] 63 CLLC at ¶16,291; *The University of Western Ontario*, [1972] OLRB Rep. July 702; *The Ontario Jockey Club*, [1974] OLRB Rep. Oct. 660; *Citicom Inc.*, [1985] OLRB Rep. Jan. 57; *Corby Distillers Limited*, [1980] OLRB Rep. Feb. 194; *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523; *The Municipality of Metropolitan Toronto*, [1994] OLRB Rep. June 795; *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010.

18. Sub-sections 6(6) and (7) of the Act provide as follows:

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

(7) The Board may include other guards in the bargaining unit described in subsection (6).

19. With sub-section 6(6), the Legislature provided for a bargaining unit solely of guards as long as the circumstances in (a) and (b) have been satisfied. We agree with counsel for the applicant that the intention of the Legislature was to permit the Board to certify a trade union to represent a bargaining unit solely of guards, separate from other employees. We do not read sub-section 6(6) however to preclude the Board from certifying a trade union for more than one guard bargaining unit. The circumstances for doing this may be rare and quite unique. However, the wording of sub-section 6(6) does not preclude two bargaining units consisting solely of guards as long as the conditions in (a) and (b) have been satisfied.

20. The parties argued the community of interest and conflict of interest issues as distinct categories. What is clear from the facts is that it is difficult to separate the two issues. Some of the

community of interest factors relied upon by Windsor Casino are linked to the conflict of interest issue. Rather than distinguish factors which fall within one category or another, we have focused on all of the facts in order to determine whether surveillance staff should be in a separate bargaining unit. After carefully reviewing the material before us, the Board is satisfied that the position taken by Windsor Casino has considerable merit.

21. The facts do not disclose that there is a single security system in which security guards and surveillance operators perform similar monitoring functions, as suggested by the applicant. Security guards and surveillance staff each have their own department and report to different directors. The separation is observed in both appearance and actuality as noted in the surveillance policy. This appears to be the general practice in the gaming industry. The separation is reflective of the different functions performed by each group. Security guards wear uniforms and work on the casino floor. They do perform a monitoring function, but they do not monitor surveillance staff in any real sense. The monitoring of surveillance staff as they enter by means of the employee entrance or in the cafeteria is very incidental to the main functions performed by security guards. The surveillance staff operates on a much higher level in the security system. They perform their functions in a locked room in the basement by means of sophisticated video and audio equipment. Surveillance operators receive extensive training and their skills far exceed those of security guards. They possess such sensitive information that a policy exists to ensure that they cannot transfer to any other job in the casino. From their locked room, surveillance operators covertly monitor all casino activities. A prime focus for them is the monitoring of gaming activities but their monitoring of employees, including security guards, is not incidental. Surveillance operators consistently monitor customers and employees including security guards for cheating and stealing and they monitor employees to ensure they follow proper procedures. Surveillance operators do perform a unique function and have a unique responsibility to their employer.

22. Security guards and surveillance operators do not work completely independently. As noted earlier, there is communication between the two groups by means of a phone and a walkie talkie. These contacts are to ensure that each group properly performs its functions. Security guards and surveillance operators do monitor the same activities, such as the transfer of money. As part of their duties in connection with these activities, surveillance operators are watching the security guards to insure that they are following proper procedures and that they are not engaged in any criminal activity. We agree with the submission by counsel for Windsor Casino that there exists some functional coherence between the two groups, but no meaningful functional integration.

23. Counsel for the applicant submits that the self-monitoring of security guards and surveillance staff is not the sort of conflict of interest contemplated by the Act. Counsel also argues that any conflict of interest is merely incidental since the primary focus for the surveillance staff is on gaming activities. The type of monitoring which occurs between security guards is generally not the sort of conflict of interest contemplated by the Act. The sort of monitoring by surveillance operators of security guards is of a different degree and character. Their function, as noted earlier, entails the monitoring of security guards which is not merely incidental. It is precisely this type of monitoring which creates a conflict of interest. We also disagree with the proposition that no conflict of interest would exist if both groups were placed in the same bargaining unit. As noted earlier, surveillance operators monitor all activities and they monitor security guards. They look for criminal offences and observe whether security guards are following proper procedures. The surveillance operators make reports of what they hear or observe and they collect evidence for prosecutions. If a security guard was terminated for failing to follow proper procedures, it is likely that a surveillance operator would be involved in compiling and giving evidence. In our view, this does create a conflict of interest which sub-section 6(6) was intended to prevent. The same consideration which caused the parties to agree to create a security guard unit separate from the larger

employee bargaining unit are present to keep surveillance operators in a bargaining unit of their own separate from security guards.

24. The gaming industry is a new and unique industry in this Province. A fundamental objective of the security system is to ensure that the casino operates in the public interest and that its honesty and integrity are not compromised. The separation of surveillance operators from other employees including security guards is critical to the viability of the security system. By placing surveillance operators in a bargaining unit with security guards there is a risk that the independence and impartiality of surveillance operators will be compromised. Although the Board prefers larger units, fragmentation is only one factor the Board takes into account in shaping bargaining units. The security guard provision itself provides for a degree of fragmentation. In any event, any concerns the Board might have about fragmentation in this case are outweighed by the considerations referred to above.

25. For the foregoing reasons, the Board finds that a bargaining unit consisting solely of surveillance staff constitutes an appropriate bargaining unit. This matter is referred to a Labour Relations Officer to assist the parties in developing a description for a surveillance staff bargaining unit, to address any section 9.4 issue and to count the ballots if appropriate.

3232-94-R; 3233-94-U Amalgamated Clothing and Textile Workers' Union, AFL-CIO, CLC, Applicant v. Z-Lite Jenamees, Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Employee - Board finding lead hand, who was primary in-house organizer for union, to be "employee" within meaning of Act - Board determining that lay-offs of three bargaining unit members tainted by anti-union animus - Reinstatement with compensation ordered - Board certifying union under section 9.2 of the Act - Board directing distribution of Board notice and directing that union be permitted to convene meeting of employees on company premises during normal working hours

BEFORE: *Janice Johnston*, Vice-Chair.

APPEARANCES: *T. Stephen Lavender, John Wensley, Shirley Stoker, Sue Gauvin and Pauline George* for the applicant; *Scott Zimmer, Marlene Gillespie and James Stewart* for the responding party.

DECISION OF THE BOARD; February 20, 1995

1. File No. 3232-94-R is an application for certification and File No. 3233-94-U is an application pursuant to section 91 of the *Labour Relations Act* (the "Act") alleging violations of sections 3, 65, 67, 71, 91 and 92.2 of the Act.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. The applicant (also referred to as the "union") takes the position that it should be certified pursuant to section 9.2 of the Act. Due to the conduct of the responding party (also referred

to as the “employer” or the “company”) it is the union’s contention that the true wishes of the employees cannot be ascertained and that the Board should therefore exercise its discretion and certify the union.

4. The application pursuant to section 91 of the Act deals with the layoffs of three individuals, Shirley Stoker, Sue Gauvin and Pauline George. The union asserts that these three individuals were laid-off because of their support for the union and their organizing attempts on behalf of the union.

5. The other matter in dispute between the parties concerns the status of an employee, Ms. Gail Scions. It is the position of the union that Ms. Scions is managerial and as such should not be included in the bargaining unit pursuant to section 1(3) of the Act. The employer takes the opposite position.

6. The employer was not represented by legal counsel in these proceedings. At the outset I made it clear that there is no requirement to retain counsel and that the Board often conducts hearings at which one or more parties are unrepresented. However, I stressed that the hearing was a legal proceeding and that persons appearing on their own behalf must bear the risks involved with doing so. I indicated that the employer must assume responsibility for the presentation of their case. At the outset and on many occasions throughout the hearing I explained the process to the employer. However, I made it clear that I could not provide the company with advice as this would be inconsistent with my role as adjudicator in the proceedings. In dealing with objections raised by counsel for the union, I explained to the company various rules of evidence such as the difference between examination-in-chief and cross-examination, what constitutes hearsay evidence, etc. I also explained the order of proceeding to the employer and clarified that they were to proceed first.

7. The Board heard from seven witnesses over nine days of hearing. To a large extent the evidence given by the various individuals is consistent, it is the interpretation of what was said and why certain events transpired which is in dispute. The witnesses generally gave their evidence in a candid straight forward manner. However, I do have serious concerns with regard to the evidence given by Ms. Sylvia Beaver. It was obvious on the day that she gave the majority of her evidence that she was in the midst of a personal crisis. While it was never clarified, it appears that she was extremely worried about her daughter. Her evidence was vague and riddled with internal inconsistencies. While I do not believe Ms. Beaver was intentionally misleading the Board, it is clear that her evidence cannot be relied on. In addition, I do not accept some of the evidence given by Mr. Scott Zimmer, one of the owners of the company, as providing a complete explanation for events that occurred. Also, at times he was vague and appeared to have difficulty remembering events. Where his testimony and that of Ms. Shirley Stoker diverge I will accept the testimony of Ms. Stoker as she had a much clearer recollection of what had transpired.

8. For the purposes of resolving the issues before me it is not necessary to set out all of the evidence in great detail. For example, I heard extensive evidence on health and safety matters which were of concern to some of the employees. Some of these health and safety concerns pertain to the physical plant and some to employee exposure to lead and its effects. I do not propose to review this evidence other than to observe that health and safety concerns were one of the factors which motivated Ms. Stoker to contact the union.

9. Z-Lite-Jenamees is a small company located in Woodstock, Ontario. If Ms. Scions is included in the bargaining unit, there are thirteen employees. The company produces light fixtures and lamps. The majority of the work performed involves the production of tiffany lamps for residential use.

The Issue Concerning Ms. Gail Scions

10. Ms. Scions is employed as a glass cutter. She is a long term employee and has been with the company for five or six years, which is the approximate length of the company's existence. Ms. Scions provides some work direction to the employees whose primary work is the assembly of Tiffany lamps. These individuals were referred to by the parties as the "assemblers". However, the evidence is clear that Ms. Scions does not hire or fire employees; grant raises or promotions; or demote or discipline employees. In addition, she does not make recommendations on any of the above matters. She is paid hourly and does not have an office or access to company files. By virtue of her experience Ms. Scions is involved in the training of employees. In the absence of the owner, Scott Zimmer, employees take questions or concerns to her. If she can deal with the issue she does, if not she tells the employee to wait for Mr. Zimmer's return and to deal directly with him. I have no doubt that the employees working as assemblers viewed her as someone who is knowledgeable about the company and as someone they could go to for assistance. However, it is also clear that Mr. Zimmer made the decisions and that Ms. Scions merely relayed these decisions to the workers.

11. Section 1(3) of the Act provides:

1.- (3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

12. In the *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 the Board summarized the purpose of what was then section 1(3)(b) [now section 1(3)] and the general approach taken by the Board in its application to a particular situation. The Board stated:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby*, [1974] CLRB at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the workinglife of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the

grounds of their "ability". The employer does not want management' identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when is is promoted to a position where he exercises management functions over it.

3. *The Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with the. Thus, the right to hire, fire promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which re so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-or-

ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to install good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by the section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should be excluded from collective bargaining reason or section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is

infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

• • •

13. After having carefully reviewed the evidence and the submissions of the parties I am of the view that Ms. Stoker does not exercise managerial functions which would result in the conflict of interest which section 1(3) of the Act was designed to prevent. Her role in the work place is that of a lead hand who provides work direction and assistance to her fellow employees. Accordingly, Ms. Stoker is an employee within the meaning of the Act and should be included on the list of employees.

The Remaining Issues

14. Ms. Shirley Stoker was employed by the company as an assembler and worked there for approximately a year and a half. She was the primary in-house organizer for the union. Ms. Stoker's reasons for approaching the union were as already noted, concerns with regard to health and safety and the manner in which lead was dealt with in the plant, a lack of pay raises and mandatory overtime (which it appears she felt was excessive). Ms. Stoker contacted the union and arrangements were made for a meeting on November 9, 1994 with Mr. John Wensley, an organizer for the union.

15. The meeting on November 9, 1994 was held at Ms. Stoker's house. Ms. Stoker, Ms. George and one other employee attended this meeting with Mr. Wensley. All three employees signed membership cards at this meeting. The discussions at this meeting primarily dealt with concerns about health and safety matters in the plant including exposure to lead. A date was set for a second meeting with Mr. Wensley to take place on November 16, 1994.

16. Ms. Stoker made the arrangements for the meeting on November 16, and personally invited all of her co-workers except for one individual. She did not invite this one individual as she understood that the person was a heavy drinker and therefore, in her opinion, unable to understand the issues. On Sunday November 12, 1994, Ms. Stoker contacted Ms. Sylvia Beaver, who was employed at the company as an assembler. Ms. Stoker told Ms. Beaver that there was going to be a union meeting on November 16 at her house. She told Ms. Beaver that one meeting had already taken place, that she felt there was strong support for the union, that membership cards had been signed (although she didn't tell her who had signed cards) and that health and safety matters had been discussed.

17. The next morning while Ms. Beaver and Ms. Stoker were working Ms. Beaver indicated that she was going to attend the meeting but that she wasn't going to sign a union card as she felt union dues were excessive. Ms. Stoker informed her that this wasn't true and after a bit more discussion the subject was dropped.

18. On Wednesday November 16, Ms. Beaver called Mr. Zimmer at 6:45 a.m. and told them that there was going to be a union organizing meeting that evening at Shirley Stoker's house. It appears from the evidence that Mr. Zimmer was quite surprised by this information and that the conversation was very brief.

19. Ms. Stoker invited Ms. Scions to the meeting in a telephone conversation after work on November 16, 1994. In the course of the conversation they discussed the reasons why some employees wanted a union. Ms. Scions indicated that she knew Scott and that he would probably close the plant or move it to another location if a union was successful in organizing the employees. Ms. Stoker responded that she felt he couldn't do that as he had government money tied up in the

plant and had hired people through Jobs Ontario. Ms. Scions was also concerned that the union would try to close the company down. Ms. Stoker indicated to her that the employees in favour of the union weren't out to close anybody down, but were only trying to clean the place up. Ms. Scions responded that she was just trying to protect her job. Ms. Stoker advised Ms. Scions that there had already been one union meeting and that membership cards had been signed, although she didn't indicate who had attended the meeting or who had signed the cards. Ms. Stoker told Ms. Scions that she felt very sure that they would get the support they needed to bring in the union and that she expected most employees to attend the meeting that night. Ms. Scions said that she wasn't interested in the union and the conversation concluded.

20. Shortly after her conversation with Ms. Stoker, Ms. Scions tried to contact Mr. Zimmer at his home. Mr. Zimmer wasn't at home so she spoke to Ms. Marline Gillespie, the co-owner of the company and Mr. Zimmer's spouse. Ms. Scions advised Ms. Gillespie that a union organizing meeting was to take place that evening at Shirley Stoker's house. Ms. Gillespie suggested to Ms. Scions that she attend that meeting that evening and to use Ms. Scions words "voice her opinions along with the other employees". Ms. Scions decided she did not want to attend the meeting and did not do so.

21. The meeting on November 16 was attended by seven out of the thirteen individuals invited. The three individuals who attended the first meeting and four additional individuals were at the meeting. Although three more cards were signed that evening only two of them correspond to the names on the schedule of employees agreed to by the parties. Ms. Gauvin attending this meeting as did Ms. Sylvia Beaver. After discussions had taken place regarding concerns in the work place Ms. Gauvin indicated that if it took a union to get things straightened out then she was prepared to give it her full support. Ms. Pauline George was also at this meeting. She too expressed support for the union and at one point stated that if everyone at the meeting signed a card the union would no doubt get in. Ms. Beaver reacted to this statement and indicated that she was not going to sign a card. She stated that Mr. Zimmer had not sent her to the meeting (although no one had suggested this) and that Mr. Zimmer deserved another chance. She suggested that a list of concerns be brought to Mr. Zimmer's attention and that he be given an opportunity to correct things. Ms. Beaver left the meeting early. Ms. Gauvin signed a union membership card at this meeting, after Ms. Beaver had gone.

22. The next day at work Ms. Beaver went to Mr. Zimmer's office to discuss the possibility of a meeting to deal with employee concerns. She requested that Ms. Stoker join them. Mr. Zimmer left Ms. Beaver in his office and went to get Ms. Stoker at her work station. He requested that she come to his office for a few minutes and they returned to Mr. Zimmer's office. A brief discussion ensued and an agreement was reached to hold a meeting. Ms. Beaver asked that Ms. Scions be present at this meeting and Mr. Zimmer indicated that he would like Ms. Gillespie to attend.

23. Although it was originally agreed to try to have the meeting earlier, it in fact took place on Monday, November 21, 1994 in the cafeteria. Prior to the commencement of the meeting, Mr. Zimmer went and got Ms. Stoker at her work station. She accompanied him to the cafeteria where the meeting took place. The meeting lasted approximately twenty minutes and was attended by Ms. Stoker, Ms. Beaver, Ms. Scions, Mr. Zimmer and Ms. Gillespie. Various concerns regarding health and safety and exposure to lead were discussed.

24. The assemblers work two per table in an open room. The door to the cafeteria is within sight of the assemblers. Ms. George saw Mr. Zimmer approach Ms. Stoker and Ms. Stoker accompany him to the cafeteria. If the other assemblers were looking up, they too could have observed Mr. Zimmer and Ms. Stoker go to the cafeteria together.

25. On Tuesday November 22, 1995 a third union meeting was held. Although it is not clear exactly how many employees were invited, at least two or three individuals who had not yet attended a meeting were invited. Only the three grievors Ms. Stoker, Ms. Gauvin and Ms. George came to this meeting. I have no evidence that any other attempts were made to solicit support for the union, other than the three meetings already described.

26. On Thursday November 24, 1994 Ms. Gauvin and Ms. Stoker approached Mr. Zimmer and asked to speak to him. They told him that they had concerns with regard to the lead levels in their blood and requested workers' compensation forms. Ms. Stoker and Ms. Gauvin had concluded that their lead levels were dangerously high based on information contained in what may have been a government booklet on lead regulations in the work place. They also had both visited their doctors recently and had been advised that their blood lead levels were higher than normal. Mr. Zimmer did not have the workers' compensation forms on the premises but arranged for them to be filled out and picked up by Ms. Stoker and Ms. Gauvin the next morning. After Ms. Stoker and Ms. Gauvin left the premises Mr. Zimmer informed the other employees that the two individuals had gone off on workers' compensation due to their high lead levels. He cautioned the other employees to follow proper hygiene practices and to ensure that they washed their hands. Mr. Zimmer spoke to the other employees to make certain that they were doing everything possible to protect themselves.

27. The following day, November 25, Ms. Stoker and Ms. Gauvin went to the company to pick up the workers' compensation forms and their paycheques. Included in the envelope with their paycheque was a notice that they had been laid-off effective December 9, 1995. Ms. George also received a notice of lay-off. The notices were dated November 23, 1995 and although he could not be certain, Mr. Zimmer thought that the decision to lay these employees off had been made the previous weekend, on November 19 or 20. Mr. Zimmer did not mention the impending lay-off to Ms. Stoker or Ms. Gauvin when they informed him they were going on workers' compensation although the decision had been made by this point.

28. On December 9, 1995 Ms. Gauvin and Ms. Stoker went to the company to pick up their paycheques, records of employment and vacation pay. They each received the following notice at the same time:

DEC 09 1994

("NAME")

THIS IS TO NOTIFY YOU THAT YOUR EMPLOYMENT WITH JENAMEES IS NO LONGER NEEDED, AS YOUR JOB HAS BEEN ELIMINATED DUE TO A DECLINE IN ORDERS AND RESTRUCTURING AND THEREFORE LAYOFF IS PERMANENT AS OF DEC 09 1994.

"MARLENE GILLESPIE"

Ms. George received a notice utilizing the same wording.

29. Ms. George continued to work after the receipt of her notice of lay-off on November 25th. On December 7, 1994 while employees were on break in the cafeteria (no members of management were present), Ms. Scions decided to bring up the topic of the union in an attempt to relieve what she referred to as the tension in the room. She indicated that she knew no one wanted to talk about it but that she wondered why people thought that a union could help them. A discussion ensued in which some people spoke in favour of the union and some spoke against it. Ms. George voiced the opinion that the union could give her job security. Ms. Scions replied that a

union couldn't prevent her from being laid-off. Another individual argued that if there was a union then Ms. George would have to be recalled. Ms. Beaver asked Ms. Scions if she thought Mr. Zimmer might close the plant if the union got in. Ms. Scions replied that she didn't know but probably.

30. Mr. Zimmer could not remember if he and Ms. Beaver discussed what transpired at the meeting on November 16, 1995. Given that Ms. Beaver was in his office when Ms. Stoker arrived the next day, it is reasonable to infer that they did. As both Ms. George and Ms. Gauvin had expressed support for the union at the November 16 meeting in Ms. Beaver's presence, it is reasonable to conclude that Mr. Zimmer was aware of their views. As Mr. Zimmer and Ms. Gillespie were aware that Ms. Stoker had hosted the union meetings, her support for the union would have been obvious.

31. I heard extensive evidence that the layoffs of the three grievors were necessitated by a decline in orders and work. Some reference was also made to a company restructuring whereby instead of producing lamps at the company, homeworkers or contractors would assemble lamps in their homes. As the number of contractors increased, the number of employees needed would decrease. Mr. Zimmer justified the choice of these three individuals for lay-off on the basis that they had low productivity and poor attendance.

32. The union has alleged that the employer has contravened the Act. The relevant sections of the Act are sections 3, 65, 67, 71, 91 and 92.2. They read as follows:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

91.-(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

(2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The labour relations officer shall report the results of his or her inquiry and endeavours to the Board.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or

(d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

(4.1) For the purpose of remedying a contravention of section 41.1, the Board shall not settle any provision of an adjustment plan on terms determined by the Board.

(5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

(6) A trade union, council of trade unions, employer, employers' organization or person affected by the determination may file the determination, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

92.2-(2) If the trade union requests an expedited hearing of the complaint, the Board shall begin its inquiry into the complaint within fifteen days after the later of,

(a) the day on which the request is filed with the Board; and

(b) the day on which the request is delivered to the respondent named in the complaint.

33. While I accept that there was a reduction in the orders and consequently the work, the fact that a lay-off was chosen as the remedy and the timing of the layoffs gives me concern. In the past when there were work shortages, the company went to a four day work week. No explanation was provided for the failure to do so on this occasion. With regard to the timing of the decision to lay-off the three grievors, it was made shortly after the employer learned of the union organizing drive and the involvement of the grievors in it. The decision was made while there was overtime still being worked and the lay-off was changed from a temporary one to a permanent one without explanation.

34. While low productivity and the alleged poor attendance of the three grievors may have been factors taken into account by Mr. Zimmer in determining who would be laid-off, I cannot accept that they were the only reasons for the choice of these three particular individuals. It is obvious to me and I have no difficulty concluding that the involvement of the three grievors in attempts to unionize the company was also a factor taken into account in the layoffs.

35. The Board's jurisprudence is extensive in support of the principle that if an employer's actions are motivated even in part by anti-union considerations, that these actions constitute a violation of the Act notwithstanding that the employer's decision was primarily motivated by legitimate business reasons. See for example *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, *The Corporation of the London*, [1976] OLRB Rep. Jan. 990, *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299, *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848.

36. Having regard to the findings set out above, I conclude that the employer's lay-off of Ms. Stoker, Ms. Gauvin and Ms. George was prompted by anti-union animus and was a violation of section 65 and section 67 of the Act.

37. In final argument counsel for the union contended that the employer solicited employee grievances during the organizing drive and that this constituted a violation of the Act. Counsel also took the position, for the first time in final argument, that Ms. Beaver was sent to the meeting on November 16 by Mr. Zimmer as a spy and that Ms. Gillespie tried to send Ms. Scions as a spy. The evidence does not support these allegations and they are accordingly dismissed.

38. Counsel for the union also suggested, for the first time in final argument, that the employer had made inquiries of the employees as to their connection with the union's organizing drive and that these inquiries were an unfair labour practice in and of themselves. This argument was based on some extremely vague evidence from Mr. Zimmer of events which may have happened after the employer received the application for certification and on remarks made by the employer in final submissions. These allegations are without substance and accordingly are also dismissed.

39. Counsel for the union took the position that the comments made by Ms. Scions with regard to the possible closure or moving of the company also constituted a violation of the Act. I will deal with this allegation later in this decision when I am dealing with the union's application for certification pursuant to section 9.2 of the Act.

40. Section 9.2 of the Act states:

9.2 If the Board considers that the true wishes of the employees of an employer or of a member of an employers' organization respecting representation by a trade union are not likely to be ascertained because the employer, employers' organization or a person acting on behalf of either has contravened this Act, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

41. In determining whether or not to exercise the discretion contained in section 9.2 of the Act, the Board must first determine that there has been a violation of the Act and then that as a result of that violation the true wishes of the employees respecting representation by a trade union are not likely to be ascertained. Having concluded that the employer has violated the Act I now turn to whether or not the true wishes of the employees may be ascertained.

42. The facts of this case are somewhat unusual. It is very difficult to determine what effect the layoffs of the grievors had on the remaining employees. On November 24, 1995 Ms. Stoker and Ms. Gauvin took themselves out of the workplace by initiating claims for workers' compensation. All of the employees knew that was the reason they were no longer coming into work everyday. There is no evidence that the other employees knew until some time in December that they had been in fact laid-off. I heard evidence from the three grievors concerning conversations they had with other individuals, most of whom it appears were employees. It is clear that at some point the grievors told fellow employees that they had been laid-off. As the remaining employees, at least initially, thought that Ms. Stoker and Ms. Gauvin had gone on workers' compensation it is unlikely that their layoffs had much, if any, effect on the remaining workers. However, the layoff of Ms. George was known to the other workers. This layoff sent the clear message that if you were a union supporter, your job was at risk, notwithstanding the employer's stated business reasons for the layoff.

43. I would like to now turn to the comments made by Ms. Scions to the effect that she felt Mr. Zimmer would close or move the company if the union was successful in organizing the employees. The union has taken the position that these remarks constitute an unfair labour practice and that the fact that they were made means that the true wishes of the employees can no longer be ascertained. Ms. Scions voiced her opinions concerning what the employer might do if the company was unionized on at least two occasions. I have no doubt that Ms. Scions was viewed as someone who is close to Scott Zimmer, very knowledgeable and in a position of some authority. However, she took it upon herself to tell employees what she thought Mr. Zimmer might do. He did not ask her to do so, did not sanction her doing so, was not present when she was doing so and was not even aware she was doing so until much later.

44. In the course of an organizing campaign much is said by both sides that may or may not be true and may or may not occur. Emotions run high at such times as people are often strong supporters of or strong opponents of unionization. The Board on many occasions has been called upon to deal with allegations of intimidation and coercion by union supporters who in the course of their collection of membership evidence make ill advised and inappropriate comments. The Board recognizes the realities of what might occur in the workplace during an organizing campaign, and is conscious of not imposing artificial standards upon persons who inevitably end up choosing sides and may engage in heated workplace exchanges. In *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331, the Board stated:

Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscreet employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made

by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

Unless the Board views comments as creating a climate of fear that might reasonably call into question the true wishes of the employees, the Board does not disregard the membership evidence gathered in these circumstances (see *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444). In this case, Ms. Scions was simply voicing her opinion as did other employees at various times.

45. After having carefully reviewed the evidence, particularly with regard to the context in which Ms. Scions made her remarks, I cannot conclude that the expression of Ms. Scions' views constituted an unfair labour practice. Accordingly, the allegation raised by the union is dismissed.

46. Although I feel that it is a close call, I am convinced that the true wishes of the employees cannot be ascertained at this point. The layoff of Ms. George, the fact that Mr. Zimmer took Ms. Stoker off the floor and into meetings on two occasions immediately after the November 16 meeting and the remarks made by Ms. Scions make it impossible at this time for the Board to ascertain the true wishes of the employees. Viewed objectively, it is reasonable to conclude that employees would have had serious concerns with regard to their job security and consequently would have avoided the union. The actions of the employer and the comments made by Ms. Scions resulted in the "chilling" of the union's campaign. As has been observed by the Board on other occasions, if I were to direct a representation vote, at this point employees would be choosing between continued employment rather than representation by the union. (See for example, *Manor Cleaners*, [1982] OLRB Rep. Dec. 1848 and *Beaver Lumber*, [1992] OLRB Rep. May 553.)

47. Having regard to the agreement of the parties the Board is satisfied that:

all employees of Z-Lite-Jenamees in the City of Woodstock save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff,

constitute a unit of employees of the employer appropriate for collective bargaining.

48. As the statutory preconditions to the granting of a certificate under section 9.2 of the Act have been met, the Board hereby certifies the applicant for the bargaining unit set out above. In addition, the Board hereby:

- (1) Directs the responding party to reinstate Shirley Stoker and Sue Gauvin with full compensation for all losses suffered as a result of their unlawful lay-off subject to the usual principles of mitigation and their availability to return to work.
- (2) Directs the responding party to reinstate Pauline George with full compensation for all losses suffered as a result of her unlawful lay-off subject to the usual principles of mitigation.
- (3) Directs that representatives of the applicant be allowed to convene a meeting of bargaining unit employees in the absence of members of management for a period of not more than one hour on company premises during normal working hours without loss of pay for employees attending such meetings.
- (4) Directs the responding party to give to each employee in the bargaining unit a copy of the notice attached as Appendix A to the decision.

49. The Board will remain seized with regard to the quantification of damages or any other matter arising out of the implementation of this decision.

Appendix 'A'

The Labour Relations Act

NOTICE TO EMPLOYEES**Posted by Order of the Ontario Labour Relations Board**

WE HAVE GIVEN YOU A COPY OF THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT Z-LITE-JENAMEES VIOLATED THE LABOUR RELATIONS ACT BY LAYING-OFF SHIRLEY STOKER, SUE GAUVIN AND PAULINE GEORGE.

THE ONTARIO LABOUR RELATIONS BOARD HAS ORDERED THE COMPANY TO REINSTATE AND COMPENSATE THE EMPLOYEES WHO WERE LAID-OFF AND TO ALLOW THE UNION TO HAVE A MEETING WITH EMPLOYEES IN THE BARGAINING UNIT DURING NORMAL WORKING HOURS.

THE ONTARIO LABOUR RELATIONS BOARD HAS ALSO CONCLUDED THAT THE TRUE WISHES OF THE EMPLOYEES WERE NOT LIKELY TO BE ASCERTAINED AND HAS CERTIFIED THE UNION AS BARGAINING AGENT FOR THE GROUP OF EMPLOYEES DESCRIBED AS:

ALL EMPLOYEES OF Z-LITE-JENAMEES IN THE CITY OF
WOODSTOCK SAVE AND EXCEPT SUPERVISOR, PERSONS
ABOVE THE RANK OF SUPERVISOR, OFFICE, CLERICAL
AND SALES STAFF.

THE ONTARIO LABOUR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES:

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL
ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

Z-LITE-JENAMEES

PER:
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

DATED THIS 20TH DAY OF FEBRUARY, 1995.

COURT PROCEEDINGS

3579-92-R (Court File No. 607/94) Royalguard Vinyl Co., A Division of Royplast Limited, Applicant v. United Steelworkers of America, Samuel Ofosu Ansah and Ontario Labour Relations Board, Respondents

Certification - Charges - Evidence - Intimidation and Coercion - Judicial Review - Membership Evidence - Natural Justice - Practice and Procedure - Board declining to receive into evidence certain allegations which did not comply with Rules 14 and 16 of Board's Rules of Procedure - Board declining to receive other proffered evidence offending collateral evidence rule - Board not satisfied that allegations that union organizers had attempted to obtain membership evidence through coercion substantiated - Certificate issuing - Employer's reconsideration application dismissed - Employer applying for judicial review on various grounds, including allegation that Board's decision not to receive evidence of allegations that had not been properly particularized violated rules of natural justice - Judicial review application dismissed by Divisional Court

Board decision reported at [1994] OLRB Rep. Aug. 1057.

Ontario Court of Justice (Divisional Court), Borins, Rosenberg and Then JJ., February 16, 1995.

Rosenberg J. (Orally): The application is dismissed. At the conclusion of the applicant's argument, we advised the respondents that we need hear from them only with regard to the refusal of the Board to allow the evidence of the eight witnesses specified in paragraph 6 of the employer's submissions. The Board had ruled that the particulars of the evidence to be given by the proposed eight witnesses was not sufficiently particularized and the employer responded that the particulars were sufficient but, in the event that they were not, asked for the right to submit further particulars and to allow a sufficient adjournment for the Union to respond. In my view, the allegations were lacking in the necessary particulars to allow the Union to respond. The particulars, even to this hearing, have not been provided. It is clear from the other parts of the employer's response, both that response which included the allegations with regard to the eight named proposed witness and later submissions by the employer, that they were well able to give sufficient particulars when those particulars were available to them. They were certainly aware of the type of particulars that should be given in order to allow the Union to respond or to contest the evidence that the employer proposed to put before the Board. The question was one that was within the jurisdiction of the Board and, without determining whether the members of this court would have decided in the same manner, it was not patently unreasonable, nor did it lead to a miscarriage of justice to entitle this court to interfere. Accordingly, the application is dismissed.

Then J. (Orally): I agree with the reasons of Mr. Justice Rosenberg for dismissing the application for judicial review. I am fortified in the conclusion that no denial of natural justice occurred as a result of the Board's ruling because of the subsequent action of the Board in allowing all employees access to it by virtue of the special posting.

Borins J. (Orally): While I agree with the result with respect to the application, I would take a slightly different approach than Mr. Justice Rosenberg. It is, of course, fundamental that the ruling on the procedural point made by the Board, even though incorrect, should not be disturbed if it was a ruling that was made within the Board's jurisdiction. However, by way of exception, its ruling may be reviewed where the result of the ruling has had such an impact on the fairness of the proceedings that there has been a denial of natural justice. In my view, had nothing further occurred after the refusal by the Board to reconsider its ruling, and the employer had been denied

the opportunity to present evidence, there would have been that degree of procedural unfairness created by the rejection of the evidence of its employees, which was conceded by the Union's counsel to be relevant, which would have affected the proceedings in the manner suggested by Chief Justice Lamer in *Université Du Québec à Trois-Rivieres v. Larocque* (1993), 101 D.L.R. (4th) 494 at 508. As well, in that case, the principle stated by Madam Justice Heureux-Dubé J. at 510-511 would have applied:

Refusing to hear relevant and admissible evidence is a breach of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence.

However, what occurred subsequent to the Board's refusal to reconsider its ruling, in the circumstances of this case, dissipated any unfairness that had resulted to the company by the procedural ruling made. I refer to the ruling of the Board dated April 13, 1993, which required the special posting at the employer's premises of a notice in the languages of the majority of the employees. This had the result of producing the witnesses which the company subsequently called, which evidence was summarized in four letters which the company's lawyers forwarded to the Board. Therefore, the posting of this notice and the resulting evidence introduced by the employer removed the denial of natural justice created by the Board's refusal to allow the employer to introduce relevant evidence. The company, indeed, produced relevant evidence, which was rejected by the Board. The result was that certification took place. This is a slightly different approach than that taken by Mr. Justice Rosenberg. However, I agree with the result which he reached.

CASE LISTINGS JANUARY 1995

	PAGE
1. Applications for Certification	25
2. Applications for Combination of Bargaining Units.....	36
3. Applications for First Contract Arbitration	36
4. Applications for Declaration of Related Employer.....	36
5. Sale of a Business	37
6. Union Successor Rights	38
7. Section 64.2 - Successor Rights/Contract Services	39
8. Applications for Declaration Terminating Bargaining Rights.....	39
9. Applications for Declaration of Unlawful Strike	39
10. Applications Concerning Replacement Workers.....	40
11. Complaints of Unfair Labour Practice	40
12. Applications for Interim Order	44
13. Applications for Consent to Early Termination of Collective Agreement	45
14. Jurisdictional Disputes.....	45
15. Applications for Determination of Employee Status.....	45
16. Complaints under the Occupational Health and Safety Act.....	45
17. Construction Industry Grievances	46
18. Referral from Minister (Sec. 3(2)) HLDAA	48
19. Applications for Reconsideration of Board's Decision	48
20. Right of Access	49

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3925-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Montgomery Lodge Nursing Home Ltd. (Respondent)

Unit: "all employees of Montgomery Lodge Nursing Home Ltd. at 145 Farley Avenue in Belleville, save and except registered, graduate and undergraduate nurses, office and clerical staff, supervisors and persons above the rank of supervisor" (37 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4171-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent)

Unit: "all employees of Reynolds-Lemmerz Industries in the Town of Collingwood, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, CMM Coordinator, Q.C. Auditor, Chem Lab Technicians, Fatigue Technicians, Receiving Auditor, Reliability Engineer, SPC Coordinator and Special Projects Coordinator, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (492 employees in unit) (*Having regard to the agreement of the parties*)

0938-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Canadian Labour Force Development Board (Respondent)

Unit: "all employees of the Canadian Labour Force Development Board, in the City of Ottawa, save and except Labour Co-Chair, Business Co-Chair, Director of Planning & Operations, Director Research & Policy and Manager Administration" (15 employees in unit) (*Having regard to the agreement of the parties*)

1199-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. A-Lert Canada Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of A-Lert Canada Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of A-Lert Canada Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1419-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Orleans Community Care Centre Inc. (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of Orleans Community Care Centre Inc. in the City of Orleans, save and except Administrator, Assistant to the Administrator, and Nurse Supervisor and persons for whom any trade union held bargaining rights as of July 15, 1994" (6 employees in unit) (*Having regard to the agreement of the parties*)

1420-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. New Edinburgh Square Inc. (Respondent)

Unit: "all employees of New Edinburgh Square Inc. in the City of Ottawa, save and except Supervisors, persons above the rank of Supervisor, registered graduate and undergraduate nurses, office and clerical staff, and sales staff" (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2030-94-R: LIUNA Local 607 (Applicant) v. Skyhigh Scaffold Construction Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1669 (Intervener)

Unit: “all construction labourers in the employ of Skyhigh Scaffold Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Skyhigh Scaffold Construction Inc. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

2039-94-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 826673 Ontario Inc. c.o.b. as LCL Contracting (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of 826673 Ontario Inc. c.o.b. as LCL Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of 826673 Ontario Inc. c.o.b. as LCL Contracting in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

2044-94-R: Labourers’ International Union of North America, Local 491 (Applicant) v. 826673 Ontario Inc., c.o.b. as LCL Contracting (Respondent)

Unit: “all construction labourers in the employ of 826673 Ontario Inc. c.o.b. as LCL Contracting in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 826673 Ontario Inc. c.o.b. as LCL Contracting in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (22 employees in unit)

2350-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of New Tecumseth Public Library Board (Respondent)

Unit: “all employees of The Corporation of the Town of New Tecumseth Public Library Board in the Town of New Tecumseth, save and except Chief Executive Officer, persons above the rank of Chief Executive Officer, Administrative Assistant, and the Confidential Secretary” (15 employees in unit)

2421-94-R: Christian Labour Association of Canada (Applicant) v. John Knox Christian School Society (Respondent)

Unit: “all employees of the John Knox Christian School Society in the City of Brampton, save and except Principal, persons above the rank of Principal, bus drivers, office and clerical staff,” (15 employees in unit)

2424-94-R: United Steelworkers of America (Applicant) v. A-1 Rent-A-Tool Ontario Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of A-1 Rent-A-Tool Ontario Ltd. in the Municipality of Metropolitan Toronto, save and except managers, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (56 employees in unit) (*Having regard to the agreement of the parties*)

2432-94-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. C.A.R.V. Masonry Inc. (Respondent)

Unit: “all journeymen and apprentice bricklayers in the employ of C.A.R.V. Masonry Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers in the employ of C.A.R.V. Masonry Inc. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, com-

mercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2804-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Calsper Developments Inc. (Respondent)

Unit: "all construction labourers in the employ of Calsper Developments Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2830-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Versa Services Ltd. (Respondent) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414, Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees Local Union No. 647 (Intervenors)

Unit: "all employees of Versa Foods Services, a Division of Versa Services Ltd. engaged in its cafeteria operation at Toyota Manufacturing Company in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and persons in bargaining units for which any trade union held bargaining rights as of November 2, 1994" (16 employees in unit) (*Having regard to the agreement of the parties*)

2833-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Kimpex Action Inc. (Respondent)

Unit: "all employees of Kimpex Action Inc. in the City of London, save and except Supervisors, persons above the rank of Supervisor, office, clerical, technical and sales staff" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2873-94-R: United Food and Commercial Workers International Union, AFL/CIU,CLC (Applicant) v. Double Z Uniform Rentals Inc. (Respondent)

Unit: "all employees of Double Z Uniform Rentals Inc. in the City of Kitchener, save and except Supervisors, persons above the rank of Supervisor, office, sales and clerical staff" (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2880-94-R: Christian Labour Association of Canada (Applicant) v. Pinedale Care Corp. operating as Pinecrest Manor Nursing Home (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Pinedale Care Corp. operating as Pinecrest Manor Nursing Home in Lucknow, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of November 8, 1994" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2881-94-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. World Contractors Residential & Commercial Drywall & Painting Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of World Contractors Residential & Commercial Drywall & Painting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of World Contractors Residential & Commercial Drywall & Painting Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit)

2938-94-R: Christian Labour Association of Canada (Applicant) v. The Association for Christian Education of St. Catharines (Respondent)

Unit: “all school teachers and other employees of The Association for Christian Education of St. Catharines employed at Calvin Memorial Christian School and Beacon Christian High School, save and except the principal, the vice-principals and persons above the rank of principal, office and clerical staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

3014-94-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. David Yan Construction Ltd. (Respondent)

Unit: “all journeymen and apprentice bricklayers and stonemasons in the employ of David Yan Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers and stonemasons in the employ of David Yan Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

3063-94-R: Labourers’ International Union of North America, Local 506 (Applicant) v. David Yan Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of David Yan Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of David Yan Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

3146-94-R: I.B.E.W. Construction Council of Ontario (Applicant) v. D & L Mechanical Limited (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of D & L Mechanical Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of D & L Mechanical Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3153-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Roach’s Taxi (1988) Ltd. (Respondent)

Unit: “all employees of Roach’s Taxi (1988) Ltd. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, the bookkeeper and persons for whom any trade union held bargaining rights as of November 30, 1994” (53 employees in unit) (*Having regard to the agreement of the parties*)

3196-94-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Wellington County Roman Catholic Separate School Board (Respondent)

Unit: “all educational assistants employed by the Wellington County Roman Catholic Separate School Board, save and except supervisors, persons above the rank of supervisor, persons employed through a co-operative training program with a college or university, and employees in bargaining units for which any trade union held bargaining rights as of December 6, 1994” (83 employees in unit) (*Having regard to the agreement of the parties*)

3209-94-R: Niagara Health Care & Service Workers Union Local 302 affiliated with Christian Labour Association of Canada (Applicant) v. The Inn On The Twenty Ltd. (Respondent)

Unit: “all employees of The Inn On The Twenty Ltd. in the Town of Lincoln, save and except Supervisors, persons above the rank of Supervisor, Chef, Sous Chef, Accounting, office and clerical staff” (36 employees in unit)

3211-94-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Bolton Stone Masonry Limited (Respondent)

Unit: “all construction labourers in the employ of Bolton Stone Masonry Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Bolton Stone Masonry Limited in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

3217-94-R: United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Scott’s Management Services Inc. (Respondent)

Unit: “all employees of Scott’s Management Services Inc. employed at the Highway 401 westbound and Highway 401 eastbound restaurants/service centres in the Township of Tilbury-East, save and except assistant manager, persons above the rank of assistant manager, clerical and office staff” (86 employees in unit) (*Having regard to the agreement of the parties*)

3219-94-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Bolton Stone Masonry Ltd. (Respondent)

Unit: “all journeymen and apprentice bricklayers and stonemasons in the employ of Bolton Stone Masonry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice bricklayers and stonemasons in the employ of Bolton Stone Masonry Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

3220-94-R: Ontario Public Service Employees Union (Applicant) v. Community Living Association for South Simcoe (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Community Living Association for South Simcoe in the County of Simcoe, save and except Supervisors, persons above the rank of Supervisor, the Executive Assistant and Personnel Assistant” (78 employees in unit)

3222-94-R: United Steelworkers of America (Applicant) v. D S I Industries Inc. (Respondent)

Unit: “all employees of D S I Industries Inc. in the City of Vaughan, save and except supervisors/forepersons, persons above the rank of supervisor/foreperson, office, clerical and sales staff” (65 employees in unit) (*Having regard to the agreement of the parties*)

3223-94-R: Christian Labour Association of Canada (Applicant) v. Caressant Care Nursing Home of Canada, Limited (Respondent)

Unit: “all employees of Caressant Care Nursing Home of Canada, Limited operating as The Maples Home for Seniors in its Retirement Home in the Township of East Zorra-Tavistock, save and except supervisors,

persons above the rank of supervisor, registered and graduate nurses, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

3235-94-R: London & District Service Workers’ Union, Local 220 S.E.I.U., A.F.L. C.I.O. (Applicant) v. Winston Hall Nursing Homes Limited carrying on business as The Village of Winston Park (Respondent)

Unit: “all retirement home employees of Winston Hall Nursing Homes Limited carrying on business as The Village of Winston Park, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, graduate and registered nurses, office and clerical staff and persons for whom any trade union held bargaining rights as of December 6, 1994” (7 employees in unit) (*Having regard to the agreement of the parties*)

3246-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Sterling Drywall (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Sterling Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Sterling Drywall in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Clarity Note*)

3262-94-R: Ontario Public Service Employees Union (Applicant) v. Double M & M Inc. (Respondent)

Unit: “all employees of Double M & M Inc. engaged in cleaning services at Conestoga College campus in the Regional Municipality of Waterloo and the City of Guelph, save and except Managers, persons above the rank of Manager and employees for which any trade union held bargaining rights as of December 9th, 1994” (40 employees in unit) (*Having regard to the agreement of the parties*)

3306-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Les Structures de Beauce Inc. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of Les Structures de Beauce Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of Les Structures de Beauce Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

3321-94-R: Labourers’ International Union of North America, Local 1089 (Applicant) v. Oakdale Cleaners & Maintenance Ltd. (Respondent)

Unit: “all employees of Oakdale Cleaners & Maintenance Ltd. employed in the City of Sarnia, save and except non-working forepersons and persons above the rank of non-working foreperson” (2 employees in unit) (*Having regard to the agreement of the parties*)

3340-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Gentry Knitting Mills Ltd. (Respondent)

Unit: “all employees of Gentry Knitting Mills Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period” (123 employees in unit) (*Having regard to the agreement of the parties*)

3366-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - Brockville Leeds & Grenville Branch (Respondent)

Unit: “all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses - Brockville Leeds & Grenville Branch, save and except supervisors, office and clerical staff” (15 employees in unit) (*Having regard to the agreement of the parties*)

3377-94-R: Ontario Public Service Employees Union (Applicant) v. Community Access Support Services (Norfolk) (Respondent)

Unit: “all employees of Community Access Support Services (Norfolk) in the Regional Municipality of Haldimand Norfolk, save and except supervisors and persons above the rank of supervisor” (57 employees in unit) (*Having regard to the agreement of the parties*)

3378-94-R: Ontario Nurses’ Association (Applicant) v. Tendercare Living Centre (Respondent) v. Service Employees International Union, Local 204 (Intervener)

Unit: “all registered and graduate nurses engaged in a nursing capacity by Tendercare Living Centre Nursing Home in Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3388-94-R: Canadian Union of Public Employees (Applicant) v. Otherways Inc. (Respondent)

Unit: “all employees of Otherways Inc. in the City of Belleville, save and except Executive Director and persons above the rank of Executive Director” (8 employees in unit) (*Having regard to the agreement of the parties*)

3412-94-R: Ontario Nurses’ Association (Applicant) v. Foyer Richelieu Welland Inc. (Respondent)

Unit: “all Registered and Graduate Nurses employed by Foyer Richelieu Welland Inc. in the City of Welland, save and except the Director of Care and persons above the rank of Director of Care” (10 employees in unit) (*Having regard to the agreement of the parties*)

3432-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at 137 Bond Street, 240 Jarvis Street and 160 Mutual Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff, and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

3434-94-R: Ontario Public Service Employees Union (Applicant) v. Centre Jules Léger (Respondent)

Unit: “all employees of Centre Jules Léger in the City of Ottawa, the City of Gloucester, the City of Belleville, the City of Sudbury and the Village of Casselman, save and except the Director and persons above the rank of Director” (60 employees in unit) (*Having regard to the agreement of the parties*)

3435-94-R: IWA - Canada (Applicant) v. Pallet Pallet Inc. (Respondent)

Unit: “all employees of Pallet Pallet Inc. at its C.J.P. Pallet & Reel Division in the Township of Puslinch, save and except supervisors, persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

3436-94-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. 160572 Canada Inc. c.o.b. as Allpark Parking Registered (Respondent)

Unit: “all employees of 160572 Canada Inc. c.o.b. as Allpark Parking Registered in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, auditors, office and clerical staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3447-94-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meaford General Hospital (Respondent) v. Group of Employees (Objectors)

Unit: "all part-time office and clerical employees of Meaford General Hospital in the Town of Meaford, save and except supervisors, persons above the rank of supervisor, and nursing secretaries" (5 employees in unit) *(Having regard to the agreement of the parties)*

3460-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Sarnia-Lambton Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Sarnia-Lambton Branch, in the County of Lambton, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (16 employees in unit) *(Having regard to the agreement of the parties)*

3490-94-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Brenner & Associates Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Brenner & Associates Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Brenner & Associates Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3519-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. The Quality Maintenance Group 1051013 Ontario Limited (Respondent)

Unit: "all employees of The Quality Maintenance Group 1051013 Ontario Limited engaged in cleaning and maintenance at 145 East Drive in the City of Brampton, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff" (5 employees in unit) *(Having regard to the agreement of the parties)*

3526-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Tilbury Concrete Transport Inc. (Respondent)

Unit: "all employees of Tilbury Concrete Transport Inc. in the Counties of Essex and Kent, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (6 employees in unit) *(Having regard to the agreement of the parties)*

3555-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Durham Region Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Durham Region Branch, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (11 employees in unit)

3558-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Consumers' Gas Company Ltd. (Respondent)

Unit: "all commissioned merchandise and appliance sales representatives employed by the Consumers' Gas Company Ltd. in its West Central Region" (8 employees in unit) *(Having regard to the agreement of the parties)*

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1937-94-R: Independent Paperworkers of Canada (Applicant) v. Standard Paper Box Division of SPB Canada Inc. (Respondent) v. IWA-Canada (Intervener)

Unit: "all hourly-rated employees of Standard Paper Box, Division of SPB Canada Inc., save and except salaried foremen, persons above the rank of foreman, office and sales staff" (71 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	57
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	57
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	54
Number of ballots marked in favour of intervener	3

2882-94-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Kitchener-Waterloo Hospital (Respondent)

Unit: "all employees of the Kitchener-Waterloo Hospital in the City of Kitchener regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, paramedical personnel, office and clerical staff, supervisors, persons above the rank of supervisor, chief engineer and persons for whom any trade union held bargaining rights as of November 7, 1994" (236 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	286
Number of persons who cast ballots	92
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	91
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	69
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	1

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2718-94-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Markborough Properties Inc. c.o.b. Delta Meadowvale Resort & Conference Centre (Respondent)

Unit: "all employees of Delta Meadowvale Resort and Conference Centre at 6750 Mississauga Road in the City of Mississauga, save and except Supervisors, persons above the rank of Supervisor, office, sales and clerical staff, Night Auditors, Guest Service Agents, persons regularly employed for not more than 24 hours per week and students employed during the summer vacation period" (173 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	181
Number of persons who cast ballots	155
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	145
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	80
Number of ballots marked against applicant	64
Number of ballots segregated and not counted	9

2877-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. 1068592 Ontario Ltd. carrying on business as Your Choice Shuttle Service (Respondent)

Unit: "all employees of 1068592 Ontario Ltd., c.o.b. as Your Choice Shuttle Service in the City of Windsor under contract to Windsor Casino Limited, save and except Supervisors, persons above the rank of Supervisor, office, clerical and dispatch staff" (89 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	96
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	72
Number of ballots marked in favour of applicant	41
Number of ballots marked against applicant	31

Applications for Certification Dismissed Without Vote

2218-94-R: Ontario Liquor Boards Employees' Union (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Metropolitan Toronto Civic Employee's Union, Local 43, Canadian Union of Public Employees, Local 79, (Intervenors)

2428-94-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent)

3160-94-R: Brewery, General and Professional Workers' Union (Applicant) v. Black Photo Corporation (Respondent) v. Group of Employees (Objectors)

3171-94-R: International Union of Operating Engineers Local 772 (Applicant) v. Black & McDonald Limited (Respondent) v. Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada AFL-CIO (Intervener)

3376-94-R: United Steelworkers of America (Applicant) v. Fionn Macummvail Pub Corp. c.o.b. as The Manx Pub (Respondent) v. Group of Employees (Objectors)

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2309-94-R: Service Employees' Union, Local 210 (Applicant) v. Wingham and District Hospital (Respondent)

Unit: "all employees of the Wingham and District Hospital in the Town of Wingham, save and except supervisors, persons above the rank of supervisor, professional medical staff, undergraduate and graduate nurses, practical registered nurses, paramedical employees, kinesiologist, payroll/personnel clerk, secretaries and students employed during the school vacation period" (84 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	65
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	44

2493-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Canusa Automotive Warehousing Inc. (Respondent)

Unit: "all employees of Canusa Automotive Warehousing Inc. in the Village of Dorchester, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (29 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	5

Number of ballots marked against applicant	19
Number of ballots segregated and not counted	4

2908-94-R: Hospitality Employees, Service Employees Union of Canada (Applicant) v. Teamsters Local 879 (Hamilton) Holdings (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit #1: "all employees of Teamsters Local 879 (Hamilton) Holdings in the City of Hamilton, save and except Building Manager, persons above the rank of Building Manager, persons regularly employed for not more than 24 hours per week, probationary employees, and office staff" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	4

3040-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Ontario March of Dimes (Respondent)

Unit: "all employees of Ontario March of Dimes employed at Fletcher's View Apartments, 4 Sir Lou Drive, in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4

Applications for Certification Withdrawn

1603-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. A.M.F. All Seasons Excavating, Division of Sharon Advertising and Research of Canada Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

1146-94-R: Long Lake Employees Association (Applicant) v. Long Lake Forest Products Inc. (Respondent) v. IWA Canada, Local 2693 (Intervener)

1817-94-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Ed Walker's Electric Limited, Alliance Security Division of Ed Walker's Electric Limited, Walker Panels Division of Ed Walker's Electric Limited, (Respondent)

1910-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. South Winds Sand & Gravel Limited and/or South Winds Development Co. Inc. (Respondents)

2001-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent)

2189-94-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local No. 880 (Applicant) v. Dunhill Contracting Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

2283-94-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Eastern Power Developers Corp. (Respondent)

3320-94-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, CLC (Applicant) v. Goodyear Canada Inc. (Respondent)

3469-94-R: United Steelworkers of America (Applicant) v. 930943 Ontario Limited (Respondent)

3514-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Trenton (Respondent)

3740-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Siemens Electric Limited Automotive Systems (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0541-94-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Milton Hydro-Electric Commission (Respondent) (*Withdrawn*)

1437-94-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. The Niagara Falls Review, a division of Thomson Newspapers Limited (Respondent) (*Endorsed Settlement*)

2002-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent) (*Withdrawn*)

3183-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent) (*Granted*)

3399-94-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent) (*Granted*)

FIRST AGREEMENT - DIRECTION

3593-94-FC: Ontario Nurses' Association (Applicant) v. Glazier Medical Centre (Respondent) (*Withdrawn*)

3660-94-FC: Westway Taxi Nepean Ltd. (Applicant) v. Retail Wholesale Canada Canadian Service Sector of United Steelworkers of America, Local 1688 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0182-91-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. State Contractors Inc., Chrysler Canada Ltd. (Respondents) v. Canadian Auto Workers Local 444 (Intervener) (*Withdrawn*)

4147-93-R: Sheet Metal Workers' International Association, Local 30 - Stainless Steel Section (Applicant) v. P.V.A. Enterprises Inc. and Reliable Food Service Equipment Inc. (Respondents) (*Granted*)

4422-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ontario Panelization Ltd. and J.A. MacDonald (London) Limited (Respondents) (*Terminated*)

0349-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Traugott Construction (Kitchener) Ltd. and Stone Square Centre Inc. (Respondents) (*Dismissed*)

1131-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. City Drywall Ltd. and One Way Drywall Inc. (Respondents) (*Endorsed Settlement*)

1141-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 461 (Applicant) v. Cineplex Odeon Corporation and/or 796278 Ontario Limited and/or Kingsbridge Theatre on the Square (Niagara) Inc. (Respondents) (*Dismissed*)

1580-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Malfar Mechanical Inc. and Toronto Plumbing and Heating Inc. (Respondents) (*Endorsed Settlement*)

1831-94-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. C.D.C. Concrete Forming Limited, G & R Forming Ltd. and Three-Towers Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 247 (Intervener) (*Withdrawn*)

2143-94-R: I.B.E.W. Construction Council of Ontario International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sutherland-Schultz Limited and/or 460535 Ontario Limited c.o.b. Sutherland-Schultz, Chrysler Canada Ltd. (Respondents) (*Withdrawn*)

2284-94-R: The Canadian Union of Public Employees (Applicant) v. The Smiths Falls Community Hospital and The Great War Memorial Hospital of Perth District (Respondents) v. Ontario Public Service Employees Union, The Independent Canadian Transit Union and its Local 6, Chris Luscombe-Mills (Interveners) (*Withdrawn*)

2390-94-R: Ultra Metal Inc., Enviro-Care Kruncher Corp. (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

2664-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Trican Materials Limited; Dunhill Contracting Ltd. (Respondents) (*Withdrawn*)

2815-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. 962204 Ontario Limited (Respondent) (*Endorsed Settlement*)

3017-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. North Side Properties Limited, Gottcon Contractors Limited, Gottardo Contracting Co. Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Holdings Company Ltd., Gottardo Management Limited, Gottardo Corporation (Respondents) (*Endorsed Settlement*)

3129-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. City Acoustics Limited and J.R. Drywall & Acoustics (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0182-91-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. State Contractors Inc., Chrysler Canada Ltd. (Respondents) v. Canadian Auto Workers Local 444 (Intervener) (*Withdrawn*)

0300-93-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC (Applicant) v. G.A. Love Foods Inc. and The Barn Fruit Markets Inc. (Respondents) (*Withdrawn*)

4147-93-R: Sheet Metal Workers' International Association, Local 30 - Stainless Steel Section (Applicant) v. P.V.A. Enterprises Inc. and Reliable Food Service Equipment Inc. (Respondents) (*Granted*)

4422-93-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ontario Panelization Ltd. and J.A. MacDonald (London) Limited (Respondents) (*Terminated*)

0349-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Traugott Construction (Kitchener) Ltd. and Stone Square Centre Inc. (Respondents) (*Dismissed*)

1131-94-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. City Drywall Ltd. and One Way Drywall Inc. (Respondents) (*Endorsed Settlement*)

1141-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of

the United States and Canada, Local 461 (Applicant) v. Cineplex Odeon Corporation and/or 796278 Ontario Limited and/or Kingsbridge Theatre on the Square (Niagara) Inc. (Respondents) (*Dismissed*)

1580-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Malfar Mechanical Inc. and Toronto Plumbing and Heating Inc. (Respondents) (*Endorsed Settlement*)

1831-94-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. C.D.C. Concrete Forming Limited, G & R Forming Ltd. and Three-Towers Construction Ltd. (Respondents) v. Labourers' International Union of North America, Local 247 (Intervener) (*Withdrawn*)

2143-94-R: I.B.E.W. Construction Council of Ontario International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Sutherland-Schultz Limited and/or 460535 Ontario Limited c.o.b. Sutherland-Schultz, Chrysler Canada Ltd. (Respondents) (*Withdrawn*)

2284-94-R: The Canadian Union of Public Employees (Applicant) v. The Smiths Falls Community Hospital and The Great War Memorial Hospital of Perth District (Respondents) v. Ontario Public Service Employees Union, The Independent Canadian Transit Union and its Local 6, Chris Luscombe-Mills (Interveners) (*Withdrawn*)

2815-94-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. 962204 Ontario Limied (Respondent) (*Endorsed Settlement*)

3017-94-R: Labourers' International Union of North America, Local 506 (Applicant) v. North Side Properties Limited, Gottcon Contractors Limited, Gottardo Contracting Co. Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Holdings Company Ltd., Gottardo Management Limited, Gottardo Corporation (Respondents) (*Endorsed Settlement*)

3129-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. City Acoustics Limited and J.R. Drywall & Acoustics (Respondents) (*Withdrawn*)

3528-94-R: The Corporation of the City of Trenton (Applicant) v. Ontario Public Service Employees Union and Canadian Union of Public Employees (Respondents) (*Granted*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2732-93-R; 2733-93-R; 2782-93-R; 2783-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688, Wayne D. Bishop (Interveners); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Trafalgar I.G.A. (formerly 763998 Ontario Inc. c.o.b. as Mann's Ema Foods) (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener); Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Stuart House Products Limited (Respondent) v. RWDSU District Council of the United Food & Commercial Workers International Union and its Local Unions 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Intervener) (*Granted*)

3549-94-R: International Brotherhood of Electrical Workers (Applicant) v. Walkerville Manor Inc. (Respondent) (*Withdrawn*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

0630-94-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) v. United Plant Guard Workers of America, Local 1962 (Intervener) (*Withdrawn*)

1870-94-R: United Steelworkers of America (Applicant) v. Burns International Security Services Ltd. (Respondent) v. United Plant Guard Workers of America, Local 1962 (Intervener) (*Withdrawn*)

1871-94-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Ltd. (Respondent) v. Canadian Security Union (Intervener) (*Withdrawn*)

1872-94-R: United Steelworkers of America (Applicant) v. Canadian Corps of Commissionaires (Respondent) (*Withdrawn*)

2392-94-R: United Steelworkers of America (Applicant) v. Canada Security Corporation (Respondent) (*Withdrawn*)

3311-94-R: Barnes Security Services Ltd. c.o.b. as Metropool Security (Applicant) v. United Steelworkers of America (Respondent) (*Granted*)

3392-94-R: United Steelworkers of America (Applicant) v. Maxon Security Service Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1361-94-R: Kevin Woodison (Applicant) v. Communications, Energy and Paperworkers Union of Canada and its Local 1291 (Respondent) v. Domtar Inc. (Intervener) (*Dismissed*)

Unit: "all employees of Domtar Inc. at its Buntin Reid Division at London, Ontario, save and except the following: a) Assistant Managers and persons above the rank of Assistant Manager b) salesmen c) foremen and persons above the rank of foreman d) students employed during the summer vacation period e) temporary personnel" (15 employees in unit)

2846-94-R: Office & Professional Employees International Union Local 225 - Union of National Defence Employees Chapter (Applicant) v. Office & Professional Employees International Union, Local 225 (Respondent) v. Union of National Defence Employees (Intervener) (*Granted*)

Unit: "all persons employed by the Union of National Defence Employees in the occupations listed in Article 32 - Clause 32.03 with the exception of the incumbent in the position of Senior Personnel Clerk Clause 32.03 Lists Machine Operator Receptionist Union Services Secretary Junior Membership Clerk Mail Clerk Accounts Clerks Education Secretary President's Secretary Senior Membership Clerk Senior Union Services Clerk Assistant to the Programs & Benefits Officer Assistant to the Negotiator" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	10

2864-94-R: Marie Tousant (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 1688, Ontario Taxi Union (Respondent) (*Dismissed*)

3123-94-R: Mark McQuabbie, Darryl T. Martin, Chris Harris, Dave Carquez, Dan Spencer, Andrew Harris, Gordon Young, Mario Carquez, Norman A. Burns (Applicant) v. Sheet Metal Worker's International Association AFL-CIO-CLC Local 269 (Respondent) v. E.K. Purdy Ltd. (Intervener) (*Granted*)

3169-94-R: Employees Office Staff Crane Supply Division of Crane Canada Inc. (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. Crane Supply Division of Crane Canada Inc. - Ottawa (Intervener) (*Withdrawn*)

3401-94-R: Robert Shaw and Employees of Roach's Red & White Taxi (Applicant) v. Service Employees Union Local 268 Affiliated with the S.E.I.U., A.F. of L. C.I.O. and C.L.C. (Respondent) (*Dismissed*)

3448-94-R: Donald H. Dozois (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union #463 (Respondent) v. Gus's Plumbing (Gaston Dozois) (Intervener) (*Withdrawn*)

3449-94-R: Ronald W. J. Howran (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union #463 (Respondent) v. Gus's Plumbing (Gaston Dozois) (Intervener) (*Withdrawn*)

3459-94-R: Stacie Mirrlees (Applicant) v. Ontario Public Service Employees Union (OPSEU) Local 235 (Respondent) (*Withdrawn*)

3497-94-R: Ronald W.J. Howran (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union #463 (Respondent) v. Gus's Plumbing (Gaston Dozois) (Intervener) (*Withdrawn*)

3518-94-R: Employees of the Millcroft Inn (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America (Respondent) v. Doane Raymond Ltd. - Receiver for the Assets of the Millcroft Inn (Intervener) (*Withdrawn*)

3532-94-R: Marina Medina (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Sabra Property Management (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3642-94-U: Confederation Freezers, a Division of Sterling Packers Limited (Applicant) v. Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America - and - Ron DeCoste, Robert Cornelius, Kevin Halliday, John McNeil, Lee Taylor, Robert Isaac, Joe McInnis and other employees in the bargaining unit represented by the Teamsters Local Union No. 419 (Respondents) (*Endorsed Settlement*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3643-94-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 467 (Applicant) v. 917297 Ontario Limited (Respondent) (*Terminated*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1249-92-U: Wallace Alfred (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers, Union of Canada (CAW-Canada) and its Local 1917 (Respondent) v. National-Standard Company of Canada Limited (Intervener) (*Dismissed*)

1253-92-U: United Food & Commercial Workers Union, Local 175 (Applicant) v. Western Grocers, division of Westfair Foods Ltd. (Respondent) (*Withdrawn*)

2865-92-U: William Hill Jr. (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938 (Respondent) (*Granted*)

2072-93-U: Kim Rae (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employ-

ees Local Union, No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Ault Foods Limited (Intervener) (*Withdrawn*)

2082-93-U: Cathy A. Clarmo and Michael Clarmo (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 (Respondent) (*Terminated*)

2499-93-U: IWA Canada (Applicant) v. Goulard Lumber (1971) Limited (Respondent) (*Granted*)

3924-93-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Banlake Associates Ltd. c.o.b. as Bancroft I.G.A. (Respondent) (*Withdrawn*)

4354-93-U: Neville James (Applicant) v. The Employees' Association of K-mart (Canada), K-mart Canada Limited, (Respondents) (*Dismissed*)

0683-94-U: United Steelworkers of America (Applicant) v. Hamilton Yellow Cab Company and Transportation Unlimited Inc. (Respondent) (*Withdrawn*)

0766-94-U: Service Employees' International Union Local 204 (Applicant) v. Chelsey Park Nursing Home (Streetsville) (a division of Diversicare 1 Limited Partnership) (Respondent) (*Withdrawn*)

0920-94-U: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. Metropol Security Ltd. (Respondent) (*Withdrawn*)

1029-94-U: Julia McCrea (Applicant) v. The Canadian Union of Public Employees, Local 79 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

1656-94-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Listowel Memorial Hospital (Respondent) (*Withdrawn*)

2023-94-U: Milan Brodniansky (Applicant) v. Olofstrom Automation Ltd. (Respondent) (*Withdrawn*)

2043-94-U: Labourers' International Union of North America, Local 491 (Applicant) v. 826673 Ontario Inc., c.o.b. as LCL Contracting ("LCL") (Respondent) (*Withdrawn*)

2054-94-U: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Ed Walker's Electric Limited Alliance Security Division of Ed Walker's Electric Limited; Walker Panels Division of Ed Walker's Electric Limited (Respondent) (*Withdrawn*)

2056-94-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. 826673 Ontario Inc., c.o.b. as LCL Contracting ("LCL") (Respondent) (*Withdrawn*)

2248-94-U: Hospitality, Commercial and Service Employees Union, Local 73, of Hotel Employees and Restaurant Employees International Union (Applicant) v. The Wayland Hotel (Respondent) (*Withdrawn*)

2281-94-U; 2338-94-U; 2710-94-U: IWA-Canada (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent) (*Dismissed*)

2399-94-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 680 (Applicant) v. Port Weller Dry Docks, A Division of Canadian Shipbuilding and Engineering Ltd. (Respondent) (*Withdrawn*)

2482-94-U: Rocco Lapadula (Applicant) v. Teamsters' Union Local 230 (Respondent) (*Dismissed*)

2573-94-U: William J. Viveen (Applicant) v. United Steelworkers of America Local 7135 (Respondent) v. National Steel Car Limited (Intervener) (*Dismissed*)

2641-94-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent) (*Withdrawn*)

2695-94-U: Office and Professional Employees International Union (Applicant) v. University Hospital (Respondent) (*Withdrawn*)

2713-94-U: Ilija Milivojevic (Applicant) v. United Steelworkers of America Local 8991 (Respondent) v. Walbar Canada Inc. (Intervener) (*Dismissed*)

2769-94-U: Donald J. McBean (Applicant) v. Canadian Security Union (Respondent) (*Withdrawn*)

2805-94-U: Josie DiMaria et al (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Macaulay Child Development Centre (Intervener) (*Withdrawn*)

2807-94-U: Bernice Wing (Applicant) v. Communications, Energy and Paperworkers' Union of Canada, Local 39 (Respondent) v. Avenor Inc. (Intervener) (*Withdrawn*)

2842-94-U: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local 680 (Applicant) v. Port Weller Dry Docks, A division of Canadian Shipbuilding and Engineering Ltd. (Respondent) (*Withdrawn*)

2866-94-U: Bruce Hackert (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America, Local 414 (Respondent) (*Withdrawn*)

2901-94-U: London and District Service Workers' Union Local 220 (Applicant) v. Louise Marshall Hospital and Mick Talpa (Respondent) (*Endorsed Settlement*)

2911-94-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a Division of Royplast Limited and Stefano Pellizzari, Stefano Pellizzari (Respondents) (*Withdrawn*)

2921-94-U: Margaret Hillier (Applicant) v. I.B.E.W. Local Union 1230 (Respondent) v. Brouillette's Manor Limited (Intervener) (*Withdrawn*)

2997-94-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Chelsey Park Oxford Diversicare Incorporated (Respondent) (*Withdrawn*)

3022-94-U: The Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. Thomson Newspapers Company of Canada Limited c.o.b. as Free Press (Respondent) (*Withdrawn*)

3034-94-U: Teamsters Local Union No. 879 (Applicant) v. Uniflo Sewer Services Inc. "USS" and Uniflo Pipeliners Canada Inc. (Respondent) (*Withdrawn*)

3047-94-U: Gilles Pigeon, Graham Wenn, Don Wynne, Gary Hepple, Don Ross, George Bedard, Gary Byng, Gail Young, Phil Blakey, Audrey Degroot, Russ Lauress (Applicants) v. ATU, Local 1587 (Respondent) (*Withdrawn*)

3104-94-U: Labourers' International Union of North America, Local 607 (Applicant) v. Duracon Tile & Concrete Ltd. (Respondent) (*Withdrawn*)

3114-94-U: Mr. Randy Stewart (Applicant) v. Teamsters Local 419 (Respondent) (*Withdrawn*)

3135-94-U: United Brotherhood of Carpenters and Joiners of America, Local 1030 (Applicant) v. IWA-Canada, Local 1-1000 and Mr. Joe da Costa (Respondent) v. Tembec Incorporated (Intervener) (*Dismissed*)

3140-94-U: Phillip L. Patterson (Applicant) v. Local 128, Boilermakers and Tony Roach and Mike McCabe (Respondents) (*Withdrawn*)

- 3174-94-U:** Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. 752265 Ontario Ltd. c.o.b. as Loeb Club Plus Kemptville (Respondent) (*Withdrawn*)
- 3238-94-U:** Bert Roseblade (Applicant) v. Canadian Union of Public Employees (Local 1022) (Respondent) (*Withdrawn*)
- 3250-94-U:** Joe Enright, Leo White, Peter Hunt (Applicants) v. Teamsters Union Local 879 (Respondent) (*Withdrawn*)
- 3260-94-U:** Service Employees Union Local 268 affiliated with the S.E.I.U. A. F. of L., C.I.O., and C.L.C. (Applicant) v. Roach's Red and White Taxi (Respondent) (*Withdrawn*)
- 3293-94-U:** United Food and Commercial Workers International Union Local 175 (Applicant) v. Evergreen Spring Site, Burt Mandics & Donald Gray (Respondent) (*Withdrawn*)
- 3298-94-U:** International Ladies Garment Workers Union (Applicant) v. Bigi Canada Ltd. (Respondent) (*Endorsed Settlement*)
- 3324-94-U:** United Food and Commercial Workers International Union 175 and 633 (Applicant) v. Michael York (Toronto) Limited c.o.b. as Campbellford IGA (Respondent) (*Withdrawn*)
- 3332-94-U:** Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Keanall Industries Inc. (Respondent) (*Withdrawn*)
- 3338-94-U:** Kim Rae (Applicant) v. Ault Foods Limited (Respondent) (*Withdrawn*)
- 3343-94-U:** Niagara Health Care & Service Workers Union Local 302 affiliated with Christian Labour Association of Canada (Applicant) v. Inn On The Twenty (Respondent) (*Withdrawn*)
- 3380-94-U:** Clifford Morgan (Applicant) v. U.S.W.A. Rep. Local 3950 Mary Simms (Respondent) (*Dismissed*)
- 3381-94-U:** National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Canadian Holidays Limited (Respondent) (*Withdrawn*)
- 3424-94-U:** Armando Facchini (Applicant) v. C.P.U. Local 1497, Toronto, Ontario (Respondent) (*Dismissed*)
- 3425-94-U:** Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers (Applicant) v. Tarpin Lumber Incorporated (Respondent) (*Withdrawn*)
- 3431-94-U:** Shirley Samaroo House/York Womens' Shelter Employees (Applicant) v. Service Employees International Union Local 204 (Respondent) (*Dismissed*)
- 3439-94-U:** Ronald William Winter (Applicant) v. United Plant Guard Workers of America Local 1956 (Burns Security International) (Respondents) (*Dismissed*)
- 3475-94-U:** Ontario Public Service Employees' Union (O.P.S.E.U.) Local 341 (Applicant) v. The Ministry of Solicitor General & Correctional Services Millbrook Correctional Centre (Respondent) (*Withdrawn*)
- 3477-94-U:** Dawn Leona Berger (Applicant) v. Kettle Creek Gardens Retirement Home and Apartments (Respondent) (*Withdrawn*)
- 3480-94-U:** Lisa Thistle (Applicant) v. Reliance Employee Association (Respondent) v. Reliance Electric Limited (Intervener) (*Withdrawn*)

3485-94-U: National Automobile Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 525 (Applicant) v. Roberts Gordon Canada Inc. (Respondent) (*Withdrawn*)

3496-94-U: Pat Murgatroyd (Applicant) v. Queenslea Drywall (Respondent) (*Dismissed*)

3504-94-U: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Brenner & Associates Inc. (Respondent) (*Terminated*)

3515-94-U: Mr. Nazzareno Protomanni (Applicant) v. North Bay Public Library (Respondent) (*Dismissed*)

3521-94-U: Desmond Pitter (Applicant) v. Toronto Transit Commission (Respondents) (*Dismissed*)

3522-94-U; 3523-94-U: Wm. J. McLaughlin (Applicant) v. Ontario Public Service Employees Union and the Crown in Right of Ontario (Respondent) (*Withdrawn*)

3525-94-U: Luisa Gaudio (Applicant) v. Shebba Willet (Respondent) (*Dismissed*)

3535-94-U: James Molloy (Applicant) v. Transportation, Communications International Union Local 2302 (Respondent) (*Dismissed*)

3540-94-U: Mr. Syed G. Naqvi (Applicant) v. Mr. Byron Penny, Chief Engineer North York General Hospital (Respondent) (*Dismissed*)

3541-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Center Manufacturing Inc. (Respondent) (*Withdrawn*)

3592-94-U: The Canadian Union of Public Employees, Local 2001 (Applicant) v. The Toronto Hospital - General Division (Respondent) (*Withdrawn*)

3604-94-U: London and District Service Workers' Union, Local 220 (Applicant) v. Steeves & Rozema Enterprises Limited (Respondent) (*Withdrawn*)

3664-94-U: Jabbour Gabriel (Applicant) v. Ford Motor Company (Respondent) (*Dismissed*)

3775-94-U: Brad Wilson (Applicant) v. Canadian Union of Public Employees Local 152 (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3444-94-M: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canac Kitchens Limited and Joe Capone (Respondents) (*Withdrawn*)

3502-94-M: Service Employees International Union, Local 204 (Applicant) v. 794641 Ontario Limited o/a Kelsey's (Respondent) (*Endorsed Settlement*)

3505-94-M: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Brenner & Associates Inc. (Respondent) (*Terminated*)

3565-94-M: United Brotherhood of Carpenters and Joiners of America Local 1030 (Applicant) v. IWA-Canada, Local 1-1000 and Tembec Forest Products (1990) Inc. (Respondents) (*Dismissed*)

3591-94-M: The Canadian Union of Public Employees, Local 2001 (Applicant) v. The Toronto Hospital - General Division (Respondent) (*Withdrawn*)

3605-94-M: London and District Service Workers' Union, Local 220 (Applicant) v. Steeves & Rozema Enterprises Limited (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2233-94-M: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Ind-ex Distributors Limited (Respondent) (*Granted*)

3461-94-M: Cowall Manufacturing (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

1056-94-JD: Ironworkers' District Council of Ontario, International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. E.S. Fox Limited, Millwrights District Council of Ontario, Millwrights Local 1244, United Brotherhood of Carpenters and Joiners of America, Ontario Erectors Association Incorporated, Association of Millwrighting Contractors of Ontario (Respondents) (*Endorsed Settlement*)

1959-94-JD: Board of Governors of Algoma University College (Applicant) v. Algoma University College Staff Association and Algoma University College Faculty Association (Respondents) (*Granted*)

3253-94-JD: The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 114 (Applicant) v. Labourers International Union of North America, Local 247 and Ellis-Don Construction Ltd. and J.P. Matte Peintures Ltee. (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1724-94-M: The Muskoka Board of Education (Applicant) v. The Ontario Secondary School Teachers' Federation (Respondent) (*Withdrawn*)

1859-94-M: Electro Sonic Inc. (Applicant) v. United Steelworkers of America and its Local 9038 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1161-94-OH: Rudolph F. Papp (Applicant) v. Keith Sopha, Damian Borrelli, Chedoke-McMaster Hospitals (Respondents) (*Dismissed*)

1829-94-OH: Chris White (Applicant) v. General Motors of Canada Limited (Respondent) (*Withdrawn*)

2649-94-OH: Brenda Honan (Applicant) v. Trottier Bus Lines and Lake Superior Board of Education (Respondents) (*Withdrawn*)

2888-94-OH: Terence J. Doran (Applicant) v. Ministry of Transportation (Respondent) (*Withdrawn*)

2903-94-OH: Grantley H. Howell (Applicant) v. National Steel Car Ltd. (Respondent) (*Withdrawn*)

3057-94-OH: Ernie Surge (Applicant) v. Roberts Company Canada Limited (Respondent) (*Withdrawn*)

3249-94-OH: Carol Deschenes (Applicant) v. Northern Uniform Service Corp. (Respondent) (*Withdrawn*)

3254-94-OH: George Summerfield (Applicant) v. Canadian Corps of Commissioners (Toronto & Region) (Respondent) (*Withdrawn*)

3413-94-OH: Dominic De Santis (Applicant) v. Stelwire Ltd. - Parkdale Works (Respondent) (*Withdrawn*)

3542-94-OH: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Center Manufacturing Inc. (Respondent) (*Withdrawn*)

3756-94-OH: Steven B. Rank (Applicant) v. Herrgott Industries Ltd. (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

0574-91-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. State Contractors Inc., Chrysler Canada Ltd. (Respondents) (*Withdrawn*)

4309-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Traugott Construction (Kitchener) Ltd. (Respondent) (*Dismissed*)

4423-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ontario Panelization Ltd. (Respondent) (*Terminated*)

4446-93-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. E.S. Fox Ltd., Ontario Erectors Association Incorporated (Respondents) v. Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244 (Intervener) (*Endorsed Settlement*)

0306-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. G.J. Mechanical a Division of Sudbury Crane Rental Ltd. (Respondent) (*Endorsed Settlement*)

0347-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Babcock & Wilcox Industries Ltd. (Respondent) (*Dismissed*)

0854-94-G: Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Limited (Respondent) (*Withdrawn*)

1129-94-G; 1130-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. City Drywall Ltd. and One Way Drywall Inc. (Respondents) (*Endorsed Settlement*)

1486-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. New Tall Masonry & Son Ltd. (Respondent) (*Granted*)

2251-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mastrantoni Const. Ltd. (Holiday Carpentry) (Respondent) (*Withdrawn*)

2275-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. G. Di Iorio Construction Ltd. (Respondent) (*Granted*)

2509-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2050 (Applicant) v. The Dobben Group Inc. (Respondent) (*Endorsed Settlement*)

2685-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Marrocco Brothers Const. Ltd. (Respondent) (*Endorsed Settlement*)

2724-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 721 and 765 (Applicant) v. Mometal Seaway Inc. (Respondent) (*Endorsed Settlement*)

2775-94-G: Sheet Metal Workers International Association, Local 504 (Applicant) v. Semple-Gooder Roofing Ltd. (Respondent) (*Withdrawn*)

2816-94-G: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. 962204 Ontario Limited, 962204 Ontario Limited (Respondents) (*Endorsed Settlement*)

3020-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. North Side Properties Limited, Gottcon Contractors Limited, Gottardo Contracting Co. Limited, Gottardo Properties Limited, Gottardo Contracting (1980) Inc., Gottardo Holdings Company Ltd., Gottardo Management Limited, Gottardo Corporation (Respondents) (*Endorsed Settlement*)

3028-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Resar Construction Inc. (Respondent) (*Granted*)

3062-94-G: Labourers' International Union of North America, Local 493 (Applicant) v. R. M. Belanger Limited (Respondent) (*Withdrawn*)

3127-94-G; 3128-94-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. J.R. Drywall & Acoustics (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. City Acoustics Limited (Respondent) (*Withdrawn*)

3268-94-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Chicago Blower, Division of Earls court Metal Industries Ltd. (Respondent) (*Withdrawn*)

3275-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. D. J. Charlton Power Line (Respondent) (*Withdrawn*)

3282-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Endorsed Settlement*)

3287-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Honeywell Limited (Respondent) (*Withdrawn*)

3356-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Carwell Construction Limited (Respondent) (*Withdrawn*)

3363-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Delmar Masonry Company (419226 Ontario Ltd.) (Respondent) (*Withdrawn*)

3364-94-G; 3365-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Strap Drywall and Acoustics Systems Limited (Respondent) (*Withdrawn*)

3395-94-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Richards Mechanical Services Ltd. (Respondent) (*Endorsed Settlement*)

3396-94-G: International Union of Bricklayers and Allied Craftsmen Local 28 Ontario (Applicant) v. C & J Refractories & Maintenance Limited (Respondent) (*Withdrawn*)

3404-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Apollo Steel Company Limited (Respondent) (*Withdrawn*)

3441-94-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Abraham Mechanical Air Systems (Respondent) (*Endorsed Settlement*)

3442-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Weston Excavating & Grading Co. Ltd. (Respondent) (*Withdrawn*)

3466-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Centrifugal Associates Inc. (Respondent) (*Withdrawn*)

3467-94-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting

Industry of the United States and Canada (Applicant) v. Francis H.V.A.C. Services Ltd. (Respondent) (*Withdrawn*)

3493-94-G: International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Step on Class Flooring (Respondent) (*Withdrawn*)

3499-94-G: The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local Union 205 (Applicant) v. Roy's Maintenance Inc. (Respondent) (*Endorsed Settlement*)

3509-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. 696147 Ontario Inc. (Willowdale Masonry) (Respondent) (*Endorsed Settlement*)

3512-94-G: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. 975866 Ontario Limited c.o.b. as Tagg Industries (Respondent) (*Withdrawn*)

3543-94-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Dobben Group Inc. (Respondent) (*Endorsed Settlement*)

3546-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gara Masonry Contractor (Respondent) (*Withdrawn*)

3564-94-G: International Union of Elevator Constructors Local 90 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

3574-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd. (Respondent) (*Endorsed Settlement*)

3578-94-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Level Installations Systems (Respondent) (*Endorsed Settlement*)

3603-94-G: International Union of Bricklayers and Allied Craftsmen Local 1 Ontario (Applicant) v. Ontario 558526 Inc. Masonry Contractors (Respondent) (*Withdrawn*)

3648-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mid-View Construction & Drain Ltd. (Respondent) (*Endorsed Settlement*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDAA

3315-94-M: Caressant Care Nursing Home of Canada, Limited operating as Caressant Care Retirement Home (Marmora) (Applicant) v. Service Employees' Union, Local 183 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0117-92-OH; 1694-93-U: Janice Lyn Tomkins (Applicant) v. Hamilton Street Railway Co. (H.S.R.) - Dept. of Transportation for the Regional Municipality of Hamilton-Wentworth (Respondent) (*Dismissed*)

2522-92-R; 2616-92-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eli's Electric Service; Town and Country Electric Ltd.; Town and Country Electric; Steeles Electric; E & E Steeles Electric Ltd. c.o.b. as E & E Steeles Electric c.o.b. as Steeles Electric (Respondents) (*Dismissed*)

1097-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Maidstone Manufacturing Inc. (Respondent) v. Group of Employees (Objectors) (*Denied*)

2137-94-G: Labourers' International Union of North America, Local 1036 (Applicant) v. R M Elliott Construction Ltd. (Respondent) (*Denied*)

3074-94-OH: Mohamed Elkhatab (Applicant) v. Kalbray Welding Ltd. (Respondent) (*Dismissed*)

RIGHT OF ACCESS (SEC. 11.1)

3698-94-M: 917297 Ontario Limited (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 467 (Respondent) (*Terminated*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

CADON
LR
- 054

Government
Publications

ONTARIO LABOUR RELATIONS BOARD REPORTS

March 1995



ONTARIO LABOUR RELATIONS BOARD

<i>Chair</i>	J. McCORMACK
<i>Alternate Chair</i>	R.O. MACDOWELL
<i>Vice-Chairs</i>	C. ALBERTYN
	M. BENDEL
	J.B. BLOCH
	P. CHAPMAN
	L. DAVIE
	N.V. DISSANAYAKE
	D. GEE
	R.G. GOODFELLOW
	B. HERLICH
	R.J. HERMAN
	R.D. HOWE
	M. KAYE JOACHIM
	J. JOHNSTON
	B. KELLER
	P. KNOPF
	J. KOVACS
	S. LIANG
	G. MISRA
	M.A. NAIRN
	K. O'NEIL
	K. PETRYSHEN
	N.B. SATTERFIELD
	L. SHOULDICE
	I.M. STAMP
	R. STOYKEWYCH
	G. SURDYKOWSKI
	L. TRACHUK

Members

B.L. ARMSTRONG	D.A. PATTERSON
W.A. CORRELL	H. PEACOCK
K.S. DAVIES	R.W. PIRRIE
A.R. FOUCAULT	F.B. REAUME
W.N. FRASER	J. REDSHAW
P.V. GRASSO	J.A. RONSON
V. HARRIS	J.A. RUNDLE
A. HERSHKOVITZ	D. RYAN
J. IRVINE	P. SEVILLE
J. KENNEDY	R.M. SLOAN
S. LAING	M. SULLIVAN
J. LEAR	J. TRIM
C. McDONALD	M. VUKOBRAT
O. McGUIRE	R. WEISS
G. McMENEMY	W.H. WIGHTMAN
R.R. MONTAGUE	D.G. WOZNIAK
J.W. MURRAY	

<i>Registrar</i>	T.A. INNISS
<i>Board Solicitors</i>	K. HESHKA
	R. LEBI
	K.A. MacDONALD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1995] OLRB REP. MARCH

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1.	Barmaid's Arm; Re Sharon Moore	229
2.	Board of Education for the City of Windsor; Re UA, Local 552.....	234
3.	Comstock Canada, IBEW, Local 1687 and D.J. Venasse Construction Limited and; Re LIUNA, Local 493.....	249
4.	Consumers Distributing; Re USWA	250
5.	Domtar Inc., Buntin-Reid Division of, Fred McNaught, steven kendall, kevin woodison, larry kitts and Ian Smith; Re Communications, Energy and Paperworkers Union of Canada and its Local 1291	266
6.	Harold Goldson; Re CAW Canada, Local 112; Re De Havilland Inc.	266
7.	Heritage Mechanical, #821120 Ontario Inc., c.o.b. as Mette Plumbing, #821120 Ontario Inc., c.o.b. as HERITAGE M & E, DFC Mechanical Contractors Ltd., #1022472 Ontario Inc., c.o.b. as; Re SMW, Local 30.....	272
8.	Jones Wood Industries Inc.; Re CJA, Local 1072; Re Group of Employees.....	290
9.	Knob Hill Farms Limited; Re Teamsters Local Union 938; Re Group of Employees	303
10.	Meadowcroft Place (Guelph), Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services Ltd., and Meadowcroft Limited Partnership c.o.b. as; Re SEIU, Local 532 Affiliated with the A.F. of L., C.I.O. C.L.C.	324
11.	N C Sheet Metal, 2714744 Canada Inc. c.o.b.; Re Local Union 47 SMW	333
12.	Premark Canada Inc.; Re IAM.....	338
13.	Royalguard Vinyl Co.. a Division of Royplast Limited; Re USWA.....	349
14.	The Georgian Construction Company Limited; Re LIUNA, Local 183.....	354
15.	The Niagara Parks Commission; Re Hotel, Motel and Restaurant Employees' Union, Local 442	363
16.	The Ottawa Public Library Board; Re The Ottawa-Carleton Public Employees Union, Local 503	376

COURT PROCEEDINGS

1.	Maidstone Manufacturing Inc.; Re National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and OLRB.....	388
2.	Mathews Contracting Inc., a Bankrupt and the OLRB, CJA, Local 18, Coopers & Lybrand Limited, Trustee of the Estate of; Re LIUNA.....	391
3.	The Great Atlantic & Pacific Company of Canada, Limited; Re United Food & Commercial Workers International Union, Locals 175 and 633, Brian Donaghy, Darrin Fay, Frank Fortunato, Rick Fox, Helmut Halla, Robert Liotti, Donald Lupton, Gene Martin, Pam Murdock, Patricia O'Doherty, Kathy Papaconstantino, Irene Park, Cliff Skinner and OLRB.....	392

SUBJECT INDEX

- Adjournment - Certification - Charges - Employer Support - Evidence - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing
 CONSUMERS DISTRIBUTING; RE USWA 250
- Bargaining Unit - Certification - Crown Employees Collective Bargaining Act - Union applying to represent all waiters/waitresses employed by employer in City of Niagara, which would include 3 of 4 restaurants operated by employer - Employer proposing unit of all waiters/waitresses employed in Regional Municipality of Niagara, which would include all 4 of employer's restaurants - Board finding union's proposed bargaining unit appropriate
 THE NIAGARA PARKS COMMISSION; RE HOTEL, MOTEL AND RESTAURANT EMPLOYEES' UNION, LOCAL 442 363
- Bargaining Unit - Certification - Union applying to represent employees of retirement home in Guelph - Employer submitting that bargaining unit should include group of "floating" maintenance and housekeeping workers, who work out of head office and who service some 25 retirement homes owned by employer, when those maintenance employees work at Guelph home - Board determining that maintenance and housekeeping employees who float to different homes should not be included in bargaining unit - Certificate issuing
 MEADOWCROFT PLACE (GUELPH), MEADOWCROFT HOLDINGS INC., C.O.B. AS EXECU-CARE NURSING SERVICES, 5M MANAGEMENT SERVICES LTD., AND MEADOWCROFT LIMITED PARTNERSHIP C.O.B. AS; RE SEIU, LOCAL 532 AFFILIATED WITH THE A.F. OF L., C.I.O. C.L.C. 324
- Bargaining Unit - Combination of Bargaining Units - Remedies - Board earlier combining newly certified service technician bargaining unit in Sudbury with pre-existing service technician bargaining unit in southern Ontario - Union and employer agreeing on how to integrate the bargaining units, except for issue of wages - Parties returning to Board for its direction under subsection 7(5) of the Act - Board directing that Sudbury employees receive annual wage increases of 4 percent in 1993 and 1994
 PREMARK CANADA INC.; RE IAM 338
- Certification - Adjournment - Charges - Employer Support - Evidence - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing
 CONSUMERS DISTRIBUTING; RE USWA 250
- Certification - Bargaining Unit - Crown Employees Collective Bargaining Act - Union applying to

represent all waiters/waitresses employed by employer in City of Niagara, which would include 3 of 4 restaurants operated by employer - Employer proposing unit of all waiters/waitresses employed in Regional Municipality of Niagara, which would include all 4 of employer's restaurants - Board finding union's proposed bargaining unit appropriate

THE NIAGARA PARKS COMMISSION; RE HOTEL, MOTEL AND RESTAURANT EMPLOYEES' UNION, LOCAL 442 363

Certification - Bargaining Unit - Union applying to represent employees of retirement home in Guelph - Employer submitting that bargaining unit should include group of "floating" maintenance and housekeeping workers, who work out of head office and who service some 25 retirement homes owned by employer, when those maintenance employees work at Guelph home - Board determining that maintenance and housekeeping employees who float to different homes should not be included in bargaining unit - Certificate issuing

MEADOWCROFT PLACE (GUELPH), MEADOWCROFT HOLDINGS INC., C.O.B. AS EXECU-CARE NURSING SERVICES, 5M MANAGEMENT SERVICES LTD., AND MEADOWCROFT LIMITED PARTNERSHIP C.O.B. AS; RE SEIU, LOCAL 532 AFFILIATED WITH THE A.F. OF L., C.I.O. C.L.C. 324

Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES..... 290

Certification - Construction Industry - Discharge - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30. 272

Certification - Construction Industry - Union applying to represent bargaining unit of journeymen sheet metal workers - Board finding that certain individuals (whose Certificates of Qualification under *Apprenticeship Act* had lapsed for non-payment of fees) to be "journeymen sheet metal workers" and thus employees in the bargaining unit on the certification application date - Board agreeing with, but distinguishing decisions of the Board in *O.J. Pipelines*, *P&M Electric* and *Gorf* - Certificates issuing

N C SHEET METAL, 2714744 CANADA INC. C.O.B.; RE LOCAL UNION 47 SMW ... 333

Certification - Evidence - Membership Evidence - Petition - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier directing holding of pre-hearing representation vote over objection of employer - Employer

submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union's level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

KNOB HILL FARMS LIMITED; RE TEAMSTERS LOCAL UNION 938; RE GROUP OF EMPLOYEES..... 303

Certification - Judicial Review - Reconsideration - Representation Vote - Board finding ballot cast in representation vote spoiled where ballot marked with heavy "X" in "No" circle and light oblique line in "Yes" circle - Certificate issuing - Employer applying for reconsideration on ground that spoiled ballots should have been treated as "ballots cast" within meaning of section 9.1 of Act - Issue raised for first time in reconsideration application - Employer offering no reason why argument on ballots cast not raised earlier - Board also noting its established case law to effect that spoiled ballots are not included within "ballots cast" - Reconsideration application dismissed - Employer's application for judicial review dismissed by Divisional Court

MAIDSTONE MANUFACTURING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND OLRB 388

Change in Working Conditions - Unfair Labour Practice - Board rejecting union's claim that "freeze" obliging employer to give certain bargaining unit members 3 per cent wage increase, as result of "promise" allegedly in place when union applied for certification - Application dismissed

THE OTTAWA PUBLIC LIBRARY BOARD; RE THE OTTAWA-CARLETON PUBLIC EMPLOYEES UNION, LOCAL 503 376

Charges - Adjournment - Certification - Employer Support - Evidence - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

CONSUMERS DISTRIBUTING; RE USWA 250

Charges - Certification - Evidence - Intimidation and Coercion - Membership Evidence - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES..... 290

IV

- Combination of Bargaining Units - Bargaining Unit - Remedies - Board earlier combining newly certified service technician bargaining unit in Sudbury with pre-existing service technician bargaining unit in southern Ontario - Union and employer agreeing on how to integrate the bargaining units, except for issue of wages - Parties returning to Board for its direction under subsection 7(5) of the Act - Board directing that Sudbury employees receive annual wage increases of 4 percent in 1993 and 1994
- PREMARK CANADA INC.; RE IAM 338
- Construction Industry - Certification - Discharge - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed
- HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30. 272
- Construction Industry - Certification - Union applying to represent bargaining unit of journeymen sheet metal workers - Board finding that certain individuals (whose Certificates of Qualification under *Apprenticeship Act* had lapsed for non-payment of fees) to be "journeymen sheet metal workers" and thus employees in the bargaining unit on the certification application date - Board agreeing with, but distinguishing decisions of the Board in *O.J. Pipelines*, *P&M Electric* and *Gorf* - Certificates issuing
- N C SHEET METAL, 2714744 CANADA INC. C.O.B.; RE LOCAL UNION 47 SMW ... 333
- Construction Industry - Construction Industry Grievance - Board finding that *Social Contract Act* applying to UA members performing I.C.I. work for Windsor Board of Education, but that "fail safe provisions" not applying to two employees earning less than \$30,000 annually from public sector employers - Grievance alleging failure to pay compensation increases contained in provincial agreement allowed in part
- BOARD OF EDUCATION FOR THE CITY OF WINDSOR; RE UA, LOCAL 552 234
- Construction Industry - Judicial Review - Sector Determination - Board finding construction of underground concrete water storage tank to be work in ICI sector of construction industry, and not in heavy engineering sector or sewer and watermains sector as asserted by Labourers' union - Declaration issuing accordingly - Labourers' application for judicial review dismissed by Divisional Court
- MATHEWS CONTRACTING INC., A BANKRUPT AND THE OLRB, CJA, LOCAL 18, COOPERS & LYBRAND LIMITED, TRUSTEE OF THE ESTATE OF; RE LIUNA 391
- Construction Industry - Jurisdictional Dispute - IBEW and Labourers' union disputing assignment of work in connection with installation of duct or trench similar to Trenwa Duct for exclusive purpose of housing electrical cables - Board decision in *Adam Clark* case not determinative of issue - Board confirming employer's assignment to Labourers' union
- COMSTOCK CANADA, IBEW, LOCAL 1687 AND D.J. VENASSE CONSTRUCTION LIMITED AND; RE LIUNA, LOCAL 493 249
- Construction Industry - Related Employer - Board not accepting submission that "GC" and "GG" not carrying on related activities because "GC" involved in non-profit housing and "GG" active in single family homes - Board finding both companies active in residential

sector of construction industry - Board rejecting submission that "GC" and "GG" not under common control and direction where "GG" is wholly owned by "F" and "A", and where "F" and "A" have legal ability to control "GC" through power to vote majority of shares of company owning "GC" - Related employer declaration issuing

THE GEORGIAN CONSTRUCTION COMPANY LIMITED; RE LIUNA, LOCAL 183 354

Construction Industry Grievance - Construction Industry - Board finding that *Social Contract Act* applying to UA members performing I.C.I. work for Windsor Board of Education, but that "fail safe provisions" not applying to two employees earning less than \$30,000 annually from public sector employers - Grievance alleging failure to pay compensation increases contained in provincial agreement allowed in part

BOARD OF EDUCATION FOR THE CITY OF WINDSOR; RE UA, LOCAL 552..... 234

Crown Employees Collective Bargaining Act - Bargaining Unit - Certification - Union applying to represent all waiters/waitresses employed by employer in City of Niagara, which would include 3 of 4 restaurants operated by employer - Employer proposing unit of all waiters/waitresses employed in Regional Municipality of Niagara, which would include all 4 of employer's restaurants - Board finding union's proposed bargaining unit appropriate

THE NIAGARA PARKS COMMISSION; RE HOTEL, MOTEL AND RESTAURANT EMPLOYEES' UNION, LOCAL 442 363

Discharge - Certification - Construction Industry - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30. 272

Discharge - Health and Safety - Employer discharging bartender for refusing to serve customer - Bartender having reason to believe that serving customer would pose danger to herself - Bartender's discharge violating *Occupational Health and Safety Act* - Application allowed

BARMAID'S ARM; RE SHARON MOORE..... 229

Discharge - Certification - Construction Industry - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30. 272

Duty of Fair Representation - Unfair Labour Practice - Applicant alleging that union failed to

represent him adequately in various dealings with employer - Board finding no substance in union's complaints - Application dismissed

HAROLD GOLDSON; RE CAW CANADA, LOCAL 112; RE DE HAVILLAND INC.

266

Employer Support - Adjournment - Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

CONSUMERS DISTRIBUTING; RE USWA

250

Evidence - Adjournment - Certification - Charges - Employer Support - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

CONSUMERS DISTRIBUTING; RE USWA

250

Evidence - Certification - Charges - Intimidation and Coercion - Membership Evidence - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES.....

290

Evidence - Certification - Construction Industry - Discharge - Discharge for Union Activity - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30.

272

Evidence - Certification - Membership Evidence - Petition - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier directing holding of pre-hearing representation vote over objection of employer - Employer

submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union's level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

KNOB HILL FARMS LIMITED; RE TEAMSTERS LOCAL UNION 938; RE GROUP OF EMPLOYEES 303

Final Offer Vote - First Contract Arbitration - Reference - Employer applying to Minister of Labour for final offer vote under section 40 of Act after first contract arbitration initiated under section 41 - Whether Minister should direct vote - Board holding that section 40 contemplating availability of strike or lock-out activity as pre-condition to employer's right to request final offer vote - Initiation of first contract arbitration precluding strike or lock-out by virtue of subsection 40(13) of the Act, thereby foreclosing employer from requesting final offer vote - Board advising Minister not to direct vote

ROYALGUARD VINYL CO.. A DIVISION OF ROYPLAST LIMITED; RE USWA... 349

First Contract Arbitration - Final Offer Vote - Reference - Employer applying to Minister of Labour for final offer vote under section 40 of Act after first contract arbitration initiated under section 41 - Whether Minister should direct vote - Board holding that section 40 contemplating availability of strike or lock-out activity as pre-condition to employer's right to request final offer vote - Initiation of first contract arbitration precluding strike or lock-out by virtue of subsection 40(13) of the Act, thereby foreclosing employer from requesting final offer vote - Board advising Minister not to direct vote

ROYALGUARD VINYL CO.. A DIVISION OF ROYPLAST LIMITED; RE USWA.... 349

Health and Safety - Discharge - Employer discharging bartender for refusing to serve customer - Bartender having reason to believe that serving customer would pose danger to herself - Bartender's discharge violating *Occupational Health and Safety Act* - Application allowed

BARMAID'S ARM; RE SHARON MOORE..... 229

Interference in Trade Unions - Certification - Construction Industry - Discharge - Discharge for Union Activity - Evidence - Membership Evidence - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30. 272

Intimidation and Coercion - Adjournment - Certification - Charges - Employer Support - Evidence - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that

VIII

facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

CONSUMERS DISTRIBUTING; RE USWA 250

Intimidation and Coercion - Certification - Charges - Evidence - Membership Evidence - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES 290

Judicial Review - Certification - Reconsideration - Representation Vote - Board finding ballot cast in representation vote spoiled where ballot marked with heavy "X" in "No" circle and light oblique line in "Yes" circle - Certificate issuing - Employer applying for reconsideration on ground that spoiled ballots should have been treated as "ballots cast" within meaning of section 9.1 of Act - Issue raised for first time in reconsideration application - Employer offering no reason why argument on ballots cast not raised earlier - Board also noting its established case law to effect that spoiled ballots are not included within "ballots cast" - Reconsideration application dismissed - Employer's application for judicial review dismissed by Divisional Court

MAIDSTONE MANUFACTURING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND OLRB 388

Judicial Review - Construction Industry - Sector Determination - Board finding construction of underground concrete water storage tank to be work in ICI sector of construction industry, and not in heavy engineering sector or sewer and watermains sector as asserted by Labourers' union - Declaration issuing accordingly - Labourers' application for judicial review dismissed by Divisional Court

MATHEWS CONTRACTING INC., A BANKRUPT AND THE OLRB, CJA, LOCAL 18, COOPERS & LYBRAND LIMITED, TRUSTEE OF THE ESTATE OF; RE LIUNA 391

Judicial Review - Picketing - Strike - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in

pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB

392

Jurisdictional Dispute - Construction Industry - IBEW and Labourers' union disputing assignment of work in connection with installation of duct or trench similar to Trenwa Duct for exclusive purpose of housing electrical cables - Board decision in *Adam Clark* case not determinative of issue - Board confirming employer's assignment to Labourers' union

COMSTOCK CANADA, IBEW, LOCAL 1687 AND D.J. VENASSE CONSTRUCTION LIMITED AND; RE LIUNA, LOCAL 493

249

Membership Evidence - Adjournment - Certification - Charges - Employer Support - Evidence - Intimidation and Coercion - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

CONSUMERS DISTRIBUTING; RE USWA

250

Membership Evidence - Certification - Charges - Evidence - Intimidation and Coercion - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

JONES WOOD INDUSTRIES INC.; RE CJA, LOCAL 1072; RE GROUP OF EMPLOYEES

290

Membership Evidence - Certification - Construction Industry - Discharge - Discharge for Union Activity - Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30.

272

Membership Evidence - Certification - Evidence - Petition - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier

directing holding of pre-hearing representation vote over objection of employer - Employer submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union's level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

KNOB HILL FARMS LIMITED; RE TEAMSTERS LOCAL UNION 938; RE GROUP OF EMPLOYEES.....

303

Petition - Certification - Evidence - Membership Evidence - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier directing holding of pre-hearing representation vote over objection of employer - Employer submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union's level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

KNOB HILL FARMS LIMITED; RE TEAMSTERS LOCAL UNION 938; RE GROUP OF EMPLOYEES.....

303

Picketing - Judicial Review - Strike - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB

392

Practice and Procedure - Unfair Labour Practice - Union seeking leave to withdraw unfair labour practice complaint - Employer asking that withdrawal be on "with prejudice" basis - Board explaining that it is not its practice to require parties seeking to withdraw a complaint to do

so on “with prejudice” basis - Questions related to abuse of Board’s processes can be raised in subsequent application, if any - Board granting applicant leave to withdraw application

DOMTAR INC., BUNTIN-REID DIVISION OF, FRED MCNAUGHT, STEVEN KENDALL, KEVIN WOODISON, LARRY KITTS AND IAN SMITH; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 1291.....

266

Pre-Hearing Vote - Certification - Evidence - Membership Evidence - Petition - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier directing holding of pre-hearing representation vote over objection of employer - Employer submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union’s level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

KNOB HILL FARMS LIMITED; RE TEAMSTERS LOCAL UNION 938; RE GROUP OF EMPLOYEES.....

303

Reconsideration - Certification - Judicial Review - Representation Vote - Board finding ballot cast in representation vote spoiled where ballot marked with heavy “X” in “No” circle and with light oblique line in “Yes” circle - Certificate issuing - Employer applying for reconsideration on ground that spoiled ballots should have been treated as “ballots cast” within meaning of section 9.1 of Act - Issue raised for first time in reconsideration application - Employer offering no reason why argument on ballots cast not raised earlier - Board also noting its established case law to effect that spoiled ballots are not included within “ballots cast” - Reconsideration application dismissed - Employer’s application for judicial review dismissed by Divisional Court

MAIDSTONE MANUFACTURING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND OLRB

388

Reference - Final Offer Vote - First Contract Arbitration - Employer applying to Minister of Labour for final offer vote under section 40 of Act after first contract arbitration initiated under section 41 - Whether Minister should direct vote - Board holding that section 40 contemplating availability of strike or lock-out activity as pre-condition to employer’s right to request final offer vote - Initiation of first contract arbitration precluding strike or lock-out by virtue of subsection 40(13) of the Act, thereby foreclosing employer from requesting final offer vote - Board advising Minister not to direct vote

ROYALGUARD VINYL CO.. A DIVISION OF ROYPLAST LIMITED; RE USWA....

349

Related Employer - Construction Industry - Board not accepting submission that “GC” and “GG” not carrying on related activities because “GC” involved in non-profit housing and “GG” active in single family homes - Board finding both companies active in residential sector of construction industry - Board rejecting submission that “GC” and “GG” not under common control and direction where “GG” is wholly owned by “F” and “A”, and where “F” and “A” have legal ability to control “GC” through power to vote majority of shares of company owning “GC” - Related employer declaration issuing

THE GEORGIAN CONSTRUCTION COMPANY LIMITED; RE LIUNA, LOCAL 183

354

Remedies - Bargaining Unit - Combination of Bargaining Units - Board earlier combining newly

certified service technician bargaining unit in Sudbury with pre-existing service technician bargaining unit in southern Ontario - Union and employer agreeing on how to integrate the bargaining units, except for issue of wages - Parties returning to Board for its direction under subsection 7(5) of the Act - Board directing that Sudbury employees receive annual wage increases of 4 percent in 1993 and 1994

PREMARK CANADA INC.; RE IAM 338

Representation Vote - Certification - Judicial Review - Reconsideration - Board finding ballot cast in representation vote spoiled where ballot marked with heavy "X" in "No" circle and with light oblique line in "Yes" circle - Certificate issuing - Employer applying for reconsideration on ground that spoiled ballots should have been treated as "ballots cast" within meaning of section 9.1 of Act - Issue raised for first time in reconsideration application - Employer offering no reason why argument on ballots cast not raised earlier - Board also noting its established case law to effect that spoiled ballots are not included within "ballots cast" - Reconsideration application dismissed - Employer's application for judicial review dismissed by Divisional Court

MAIDSTONE MANUFACTURING INC.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND OLRB 388

Right of Access - Judicial Review - Picketing - Strike - Strike Replacement Workers - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB 392

Sector Determination - Construction Industry - Judicial Review - Board finding construction of underground concrete water storage tank to be work in ICI sector of construction industry, and not in heavy engineering sector or sewer and watermains sector as asserted by Labourers' union - Declaration issuing accordingly - Labourers' application for judicial review dismissed by Divisional Court

MATHEWS CONTRACTING INC., A BANKRUPT AND THE OLRB, CJA, LOCAL 18, COOPERS & LYBRAND LIMITED, TRUSTEE OF THE ESTATE OF; RE LIUNA 391

Strike - Judicial Review - Picketing - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to

persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB

392

Strike Replacement Workers - Judicial Review - Picketing - Strike - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB

392

Unfair Labour Practice - Certification - Construction Industry - Discharge - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

HERITAGE MECHANICAL, #821120 ONTARIO INC., C.O.B. AS METTE PLUMBING, #821120 ONTARIO INC., C.O.B. AS HERITAGE M & E, DFC MECHANICAL CONTRACTORS LTD., #1022472 ONTARIO INC., C.O.B. AS; RE SMW, LOCAL 30.

272

Unfair Labour Practice - Change in Working Conditions - Board rejecting union's claim that "freeze" obliging employer to give certain bargaining unit members 3 per cent wage increase, as result of "promise" allegedly in place when union applied for certification - Application dismissed

THE OTTAWA PUBLIC LIBRARY BOARD; RE THE OTTAWA-CARLETON PUBLIC EMPLOYEES UNION, LOCAL 503

376

Unfair Labour Practice - Duty of Fair Representation - Applicant alleging that union failed to

represent him adequately in various dealings with employer - Board finding no substance in union's complaints - Application dismissed

HAROLD GOLDSON; RE CAW CANADA, LOCAL 112; RE DE HAVILLAND INC.

266

Unfair Labour Practice - Judicial Review - Picketing - Strike - Strike Replacement Workers - Right of Access - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOCK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK, CLIFF SKINNER AND OLRB

392

Unfair Labour Practice - Practice and Procedure - Union seeking leave to withdraw unfair labour practice complaint - Employer asking that withdrawal be on "with prejudice" basis - Board explaining that it is not its practice to require parties seeking to withdraw a complaint to do so on "with prejudice" basis - Questions related to abuse of Board's processes can be raised in subsequent application, if any - Board granting applicant leave to withdraw application

DOMTAR INC., BUNTIN-REID DIVISION OF, FRED MCNAUGHT, STEVEN KENDALL, KEVIN WOODISON, LARRY KITTS AND IAN SMITH; RE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA AND ITS LOCAL 1291.....

266

3284-94-OH Sharon Moore, Applicant v. Barmaid's Arms, Responding Party

Discharge - Health and Safety - Employer discharging bartender for refusing to serve customer - Bartender having reason to believe that serving customer would pose danger to herself - Bartender's discharge violating *Occupational Health and Safety Act* - Application allowed

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *W. A. Correll* and *R. R. Montague*.

APPEARANCES: *Linda Vannucci-Santini* and *Sudhir Saha* for the applicant; *Engelo Andreou* and *Peter Arniotis* for the responding party.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE; March 23, 1995

1. This is an application under section 50 of the *Occupational Health and Safety Act*. The applicant alleges that her employment was terminated in reprisal for seeking enforcement of the Act contrary to section 50(1).

2. The relevant sections of the *Occupational Health and Safety Act* are as follows:

8.-(1) At a project or other workplace where no committee is required under section 9 and where the number of workers regularly exceeds five, the constructor or employer shall cause the workers to select at least one health and safety representative from among the workers at the workplace who do not exercise managerial functions.

• • •

(5) The selection of a health and safety representative shall be made by those workers who do not exercise managerial functions and who will be represented by the health and safety representative in the workplace, or the part or parts thereof, as the case may be, or, where there is a trade union or trade unions representing such workers, by the trade union or trade unions.

* * *

25.(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

• • •

(h) take every precaution reasonable in the circumstances for the protection of a worker.

* * *

43.-(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

(4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of the refusal to the worker's employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,

- (a) a committee member who represents workers, if any;
- (b) a health and safety representative, if any; or
- (c) a worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,

who shall be made available and who shall attend without delay.

(5) Until the investigation is completed, the worker shall remain in a safe place near his or her work station.

(6) Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that,

- (a) the equipment, machine, device or thing that was the cause of the refusal to work or do particular work continues to be likely to endanger himself, herself or another worker;
- (b) the physical condition of the workplace or the part thereof in which he or she works continues to be likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention continues to be likely to endanger himself, herself or another worker,

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof.

(7) An inspector shall investigate the refusal to work in the presence of the employer or a person representing the employer, the worker, and if there is such, the person mentioned in clause (4)(a), (b) or (c).

(8) The inspector shall, following the investigation referred to in subsection (7), decide whether the machine, device, thing or the workplace or part thereof is likely to endanger the worker or another person.

(9) The inspector shall give his or her decision, in writing, as soon as is practicable, to the employer, the worker, and, if there is such, the person mentioned in clause (4)(a), (b) or (c).

(10) Pending the investigation and decision of the inspector, the worker shall remain at a safe place near his or her work station during the worker's normal working hours unless the employer, subject to the provisions of a collective agreement, if any,

- (a) assigns the worker reasonable alternative work during such hours; or
- (b) subject to section 50, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker.

(11) Pending the investigation and decision of the inspector, no worker shall be assigned to use or operate the equipment, machine, device or thing or to work in the workplace or in the part of the workplace being investigated unless, in the presence of a person described in subsection

(12), the worker has been advised of the other worker's refusal and of his or her reasons for the refusal.

(12) The person referred to in subsection (11) must be,

- (a) a committee member who represents workers and, if possible, who is a certified member;
- (b) a health and safety representative; or
- (c) a worker who because of his or her knowledge, experience and training is selected by the trade union that represents the worker or, if there is no trade union, by the workers to represent them.

(13) A person shall be deemed to be at work and the person's employer shall pay him or her at the regular or premium rate, as may be proper,

- (a) for the time spent by the person carrying out the duties under subsections (4) and (7) of a person mentioned in clause (4)(a), (b) or (c); and
- (b) for time spent by the person carrying out the duties under subsection (11) of a person described in subsection (12).

* * *

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), sections 104, 105, 108, 110 and 111 of the *Labour Relations Act* apply with all necessary modifications.

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Ontario Labour Relations Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

3. The scheme of the Act contemplates that in every workplace in the province with between five and twenty employees a health and safety representative will be appointed. In the event that a worker refuses work because she has reason to believe that the performance of it will endanger herself or another worker, she must report it to the supervisor who will investigate it in the presence of the health and safety representative. If after the investigation by the supervisor and the health and safety representative, the worker has reasonable grounds to believe that the danger still exists, an inspector from the Occupational Health and Safety Branch must be notified. The inspector will then investigate and render a decision with respect to the alleged danger. Until the completion of this process, the worker may not be required to perform the work alleged to be dangerous and must be offered alternative work or paid her regular salary. Even in workplaces of fewer than five employees, a worker is entitled to refuse unsafe work and an inspector must be contacted. The Act prohibits any reprisal against a worker for complying with or attempting to enforce the Act. A worker need not even participate in a work refusal to be attempting to enforce the Act, she need only raise a health and safety concern.

4. Ms. Moore was a bartender at the Barmaid's Arms for three and a half years. On November 28, 1994 she advised the Manager, Mr. Arniotis, that she believed one of the regular customers to be dangerous and that he should not be allowed in the bar. She believed the customer to be dangerous as a result of being advised that he had been involved in a physical altercation with an off-duty (female) waiter in the bar a few days previously. Ms. Moore also believed that she had previously witnessed an incident in which the customer knocked a woman off of a bar stool. She had also been advised by another (female) waiter two weeks previously that the customer had been abusive to her when she tried to take his drink away at closing time. Mr. Arniotis denied that the customer was dangerous and indicated that he had seen the altercation a few days previously and the waiter had provoked it. Ms. Moore raised her concern several more times that week with Mr. Arniotis and with the owner of the bar.

5. On December 2, 1994 the customer was at the bar and asked Ms. Moore for a drink. She did not bring him one and instead immediately left work claiming that she was sick. The customer complained to Mr. Arniotis that Ms. Moore had refused to serve him.

6. On December 5, 1994 Mr. Arniotis advised Ms. Moore that if she did not serve the customer she would be terminated. The customer came into the bar and Ms. Moore refused to serve him. Her employment was terminated as a result. No investigation was conducted by Mr. Arniotis and the workplace health and safety representative as none had been selected. It appears that on some later date an inspector from the Occupational Health and Safety Branch attended at the workplace. The Board heard no evidence as to who contacted the inspector. The inspector never contacted Ms. Moore. No inspector's report was submitted in evidence but the Board was advised that the inspector "appointed" one of the employees as the health and safety representative.

7. The responding party did not deny that Ms. Moore was fired for refusing to serve the customer, nor did it deny that she said she was refusing to serve him because he was dangerous. However, the employer argued that the refusal was not really motivated by any safety concerns, but rather by Ms. Moore's anger that her friend, the waiter who had been involved in the altercation, had been terminated while the customer continued to be allowed to attend at the bar.

8. The applicant argued that the evidence clearly disclosed that she had raised a health and safety concern and had been engaged in a work refusal as was her right. She alleged that she was terminated as a result of her attempt to enforce the Act in contravention of section 50(1).

9. At the first stage of a work refusal, the employee need only have “reason to believe that” the workplace or part thereof is a danger to herself or another worker. The Board finds that Ms. Moore did have reason to believe that serving the customer in question was a danger to herself and her co-workers. We wish to emphasize that we are not determining whether or not the customer in question really was a danger but only that Ms. Moore had “reason to believe that” he was. When Ms. Moore advised Mr. Arniotis that she was refusing to serve the customer, the matter should have been investigated by himself as the supervisor and the health and safety representative. As the employer had failed to cause the workers to select a health and safety representative, no inspection occurred and the situation never reached the stage that the “reasonableness” of Ms. Moore’s concerns had to be assessed. Even if Ms. Moore’s actions are not characterized as a work refusal, she was clearly raising a health and safety concern and was terminated as a reprisal in violation of section 50(1) of the *Occupational Health and Safety Act*. It is not necessary that an employee refer to the Act in order to be seeking its enforcement.

10. The Board notes that this situation demonstrates why a health and safety representative selected by the workers is necessary even in a small workplace such as this. If there had been a worker-selected health and safety representative in this workplace, we are confident that this situation would never have escalated to the point where an employee was terminated and the Board’s involvement was required. The responding party argued that it was not aware that a health and safety representative was required and that it doubted that many businesses in this industry would have one. In fact, the employer claimed not to even have been aware of the existence of the *Occupational Health and Safety Act*. The Board has no doubt that working in a bar may sometimes be a risk to health and safety because of dangers which may be found in many workplaces, such as hazardous structures and furnishings, toxic chemicals, as well as violent customers. Employees working in such places are entitled to rely upon the protection of the *Occupational Health and Safety Act* and employers in that industry are well advised to take note of their obligations. The phrase “ignorance of the law is no excuse” is not just a cliché but a legal principle.

11. Ms. Moore testified that she now has another job and does not wish to be reinstated. She is, however, seeking damages for losses suffered as a result of the responding party’s violation of the Act. The Board therefore orders the responding party to compensate Ms. Moore for her legitimate losses from the date of discharge to the date of this order. In addition, the responding party is directed to post a copy of this decision in a prominent location in the workplace where it is likely to come to the attention of its employees for a period of sixty days. The Board remains seized of this matter in the event that the parties are unable to agree upon the amount of compensation.

DECISION OF BOARD MEMBER W. A. CORRELL; March 23, 1995

1. I agree with my colleagues in this case that management should have had an appointed employee health and safety representative for this establishment. A representative could have been most useful in setting the proper procedures for an inspection and investigation of the concerns expressed by the complainant and some simpler resolution may have resulted. The complainant herself did not immediately seek the assistance of such a representative, however, and in fact the matter was not immediately characterized by her as a health and safety problem.

2. There are two factors in this case which give me concern and cause me to dissent from

the ruling of the majority. The first factor leads me to the conclusion that the complainant has acted in a vindictive fashion against her employer and not out of concern for her safety. The award of the majority does not give proper weight to the evidence of three witnesses who are customers of the establishment. Each of them attended on their own time and at their own expense to vouch for the character of the customer involved in the allegations. They testified that he was not a man of violence, that he had been a customer of long standing, was in frequent attendance at the bar and that there had been no incidents of this nature in the past. They spoke in their testimony in direct contradiction of the evidence given by and on behalf of the complainant. The allegations of the violent nature of the customer were based mostly on hearsay evidence (see paragraph 4 of the majority decision) and formed the basis for the complainant's belief that her workplace was unsafe. In addition, the complainant does not seek to be reinstated as a part of any remedy. For these reasons, I do not find that the complainant had a reasonable basis to believe her workplace was unsafe.

3. The second problem I have with the majority decision is with the nature of the hazard. Although the following factors were not argued by the parties during this hearing, the Board should give careful consideration to them. The customer cannot be classified under section 43(6) "as equipment, machine, device or thing". Similarly, the complainant does not "use" the alleged hazard nor is the customer "a physical condition of the workplace". This will give all of us a great deal of difficulty in administering this finding. How do we control, eliminate or guard such a hazard? In addition, if the customer is a hazard, he is not a hazard to other employees. He continues to be served by other employees. Nor is the customer a full-time hazard in the workplace since he is not always in attendance at the bar. It would be difficult, to say the least, to control or eliminate a hazard which is selective and present only part of the time. This fact also adds to my sense that the allegations are based on a malicious or vindictive motive and not a belief that the workplace is unsafe. A person serving alcohol in a bar does face a certain risk, just as persons employed as electricians risk the hazards present in their workplace.

4. I believe the complainant is in the wrong forum and her case should more properly have been heard in a criminal court. I would not award her damages. All of which is respectfully submitted.

1115-94-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Applicant v. Board of Education for the City of Windsor, Responding Party

Construction Industry - Construction Industry Grievance - Board finding that *Social Contract Act* applying to UA members performing I.C.I. work for Windsor Board of Education, but that "fail safe provisions" not applying to two employees earning less than \$30,000 annually from public sector employers - Grievance alleging failure to pay compensation increases contained in provincial agreement allowed in part

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. A. Ronson* and *H. Kobryn*.

APPEARANCES: *Stephen B. D. Wahl* for the applicant; *Brian P. Nolan* and *David Musyj* for the responding party.

DECISION OF THE BOARD; March 7, 1995**I. Introduction**

1. This is an application under section 126 of the *Labour Relations Act* ("the Act"). This construction grievance raises for consideration the applicability of the *Social Contract Act* (S. O. 1993, c.5) to collective agreements in the I.C.I. sector of the construction industry.
2. The parties argued this matter on the basis of the following Agreed Statement of Facts (with exhibit references deleted):

AGREED STATEMENT OF FACTS

1. The Ontario Labour Relations Board ("the Board") issued an industrial certificate to the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 ("the Union") as the bargaining agent for all plumbers and plumbers' apprentices in the employ of the Board of Education for the City of Windsor ("the Windsor Board") on February 27, 1967.
2. From time to time, the Union and the Windsor Board have entered into collective agreements for this bargaining unit. The most recent agreement was for the period commencing May 1, 1992 until April 30, 1994 and continues as extended. The Windsor Board employs plumbers performing maintenance work throughout the year pursuant to this Collective Agreement between the Union and the Board [sic].
3. On May 18, 1983, the Board certified the Union as the bargaining agent for all plumbers and plumbers' apprentices in the employ of the Windsor Board:
 - (i) in the industrial, commercial and institutional sector (ICI sector) of the construction industry; and
 - (ii) in all other sectors of the construction industry save and except the industrial, commercial and institutional sector in the Counties of Essex and Kent.
4. By Operation of Law pursuant to the *Labour Relations Act* ("the Act") s. 147, the Provincial Collective Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the Provincial Agreement") is binding upon the Union and the Windsor Board.
5. Following the certification of the Union as the bargaining agent for all plumbers and plumbers' apprentices in the employ of the Windsor Board in May, 1983, by arrangement between the Board and the Local Union "temporary" plumbers were paid wages and received benefits on a basis that was different from the Provincial ICI Agreement.

This practice was successfully challenged by the Union, resulting in a decision of the OLRB, dated March 4, 1988, subsequently upheld by the Ontario Divisional Court and the Ontario Court of Appeal, which confirmed that the Windsor Board was an employer in the construction industry and subject to the provision of the Provincial Agreement as set out in paragraph 4 above.
6. The Windsor Board employs plumbers performing ICI construction work on various projects throughout the year. At all relevant times pertaining to this grievance, Charles Ridley ("Ridley") and John Hutton ("Hutton") were employed by the Windsor Board as plumbers performing ICI construction work and have and are earning more than \$30,000.00 per year. Ridley commenced his employment on May 31, 1988

and began his current assignment on April 19, 1993. Hutton was originally hired on June 7, 1988 and began his current assignment on April 19, 1993. They have been paid at the Provincial rates since 1988.

7. On June 18, 1994, the Board requested that the Union hiring hall provide them with two plumbers for capital projects for the period commencing June 27, 1994 until September 1994. The Union referred Tom Nielson ("Nielson") and Bob Leach ("Leach") pursuant to this staff requisition or call for personnel. Nielson and Leach are temporarily employed by the Windsor Board as plumbers in the ICI sector. They will not earn \$30,000.00 in the employ of the Windsor Board prior to September, 1994.
8. As of May 1, 1994, the Provincial Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada required a wage rate and benefit increase.
9. The Windsor Board has not paid Ridley and Hutton the May 1, 1994 increases in the rates of wages, overtime, vacation and statutory holiday pay; and increases in the required contributions, deductions and allowances with respect to Union Dues, Welfare Benefits, Pension and Industry Fund required by the Provincial Agreement.
10. The Windsor Board has not paid Nielson and Leach the May 1, 1994 increases in the rates of wages, overtime, vacation and statutory holiday pay; and increases in the required contributions, deductions and allowances with respect to Union Dues, Welfare Benefits, Pension, Industry Fund pursuant to the Provincial Agreement.
11. The Windsor Board has posted a programme pursuant to Section 29 of the *Social Contract Act* applicable to the bargaining relationship between the Union and the Windsor Board.
12. The programme posted by the Windsor Board pursuant to Section 29 of the *Social Contract Act* was not objected to or grieved by the Union or any bargaining unit employee, and no application was made by the Union pursuant to Section 30 of the Act and the Regulations thereto for appointment of a Social Contractor [sic] Arbitrator.
13. School Boards are included in the schedule to the *Social Contract Act* as a public sector employer. The Mechanical Contractors' Association of Ontario is not included in the schedule as a public sector employer.
14. No "local agreement" pursuant to the School's Sector Non-Teaching Framework Agreement was entered into between the Windsor Board and the Union.
15. Pursuant to Section 35 of the *Social Contract Act*, the Union served notice on the Windsor Board of its election to extend the current collective agreement until March 31, 1996.

Nine exhibits were attached to the Agreed Statement of Facts. These exhibits will be referred to where appropriate.

3. The parties made reference during argument to the following provisions of the *Labour Relations Act*:

45.- (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

1. To determine the nature of the differences in order to address their real substance.
2. To determine all questions of fact or law that arise.

3. To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement.
4. To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate.
5. To enforce a written settlement of a grievance.

126.-(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 45, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6.3), (8), (8.1), (8.3) and (9) to (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

148.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 141 and 147, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

and of the *Social Contract Act*:

2. In this Act,

"bargaining agent" means a trade union or other organization that, under any Act, has bargaining rights in respect of any unit of employees and includes any other organization that is recognized under section 5 as a bargaining agent; ("agent négociateur")

"collective agreement" means an agreement in writing between an employer and a bargaining agent providing for compensation of those covered by the agreement; ("convention collective")

"employee" means an employee of an employer in the public sector and includes the officers of employers and, unless exempted by the regulations, the holders of offices elected or appointed under the authority of any Act; ("employé")

"employer" means an employer in the public sector; ("employeur")

4. This Act binds the Crown in right of Ontario and all employers, employees and bargaining agents in the public sector.

23.-(1) This Part applies to,

- (a) those bargaining unit employees in respect of whom there is no local agreement that meets the criteria set out in paragraphs 1, 3 and 4 of subsection 14(1); and
- (b) those non-bargaining unit employees whose employer has not implemented a non-bargaining unit plan under section 16 by August 1, 1993.

(2) This Part does not apply to employees who earn less than \$30,000 annually, excluding over-time pay.

24.-(1) The rate of compensation of an employee is, for the period beginning June 14, 1993 and ending with March 31, 1996, fixed at the rate that was in effect immediately before June 14, 1993.

(2) For greater certainty, "compensation" in this section includes,

- (a) merit increases;
- (b) cost-of-living increases or other similar movement of or through ranges; and
- (c) increases resulting from any movements on any pay scale or other grid system.

(3) Nothing in this section prevents increases in compensation as a result of a promotion or acting promotion of an employee to a different position.

(4) An increase in compensation after June 14, 1993 under a collective agreement existing on that date is void.

(5) Despite subsection (4), a bargaining agent, by written notice to the employer, may elect to preserve increases in compensation provided for in a collective agreement existing on June 14, 1993, other than compensation described in clause (2) (a), (b) or (c).

(6) The notice of the election must be delivered to the employer not later than when the bargaining agent gives notice to the employer to bargain a renewal or new collective agreement which may extend beyond March 31, 1996.

(7) If an election is made under subsection (5),

- (a) any increase in compensation shall be deferred until the third anniversary following the day on which it would have occurred under the collective agreement; and
- (b) no increase in compensation, other than those preserved by the election, shall be given before the third anniversary following the day the collective agreement expires, or, if the collective agreement has been extended under section 35, before the third anniversary of the day it would have expired had it not been extended.

(8) An employee is not entitled to any increases in compensation after March 31, 1996 by way of,

- (a) merit increases;
- (b) cost-of-living increases or other similar movement of or through ranges; or
- (c) increases resulting from any movements on any pay scale or other grid system, except as prescribed by regulation,

in respect of employment during the period beginning June 14, 1993 and ending March 31, 1996.

(9) If a collective agreement has expired before June 14, 1993 and on that date the employees that were formerly bound by it are without a collective agreement, the compensation of these employees is fixed at the amount they were receiving under the last collective agreement in force before June 14, 1993.

(10) Despite subsection (1), if employees are represented by a bargaining agent that,

- (a) was certified or recognized as the employees' bargaining agent before June 14, 1993; or
- (b) applied for certification as the employees' bargaining agent before June 14, 1993, and a first collective agreement comes into force on or after June 14, 1993, the rate of compensation of an employee to whom the first collective agreement applies is, for the period beginning on the day the first collective agreement comes into force and ending with March 31, 1996, fixed at the rate first payable under the first collective agreement.

(11) The compensation of an employee who starts employment after June 14, 1993 is fixed at the starting amount until March 31, 1996 and the employee is bound by the program established under section 27 if the program is applicable to that employee.

• • •

29.(1) The summary of the program and a copy of this Part shall be posted in such a manner that they are likely to come to the attention of the employees affected by the program.

(2) The summary of the program shall not be posted before August 2, 1993.

(3) An employee or bargaining agent who objects to the program because it fails to meet the criteria set out in section 27 may within ten days of the summary of the program being posted request in writing that the employer amend it.

(4) The request for amendment shall set out the reasons for the objection.

(5) The employer shall, within ten days after the objection period has expired, review the objections and post in the same manner,

- (a) a notice of confirmation of the original program; or
- (b) a summary of the amended program.

(6) The program may take effect on the day the summary is posted under subsection (1) and shall remain in effect even though a request for amendment has been made under this section or a request for a review has been made under section 30.

(7) If at any time during the currency of the program the employer considers it necessary to further amend it, the amended program shall be treated as a new program and this section and sections 30 and 31 apply with necessary modifications.

30.-(1) If following the employer review under subsection 29(5), an employee of a bargaining agent considers that the program or amended program still does not meet the criteria set out in section 27, he, she or it may, within ten days after the posting under subsection 29(5), request a review of the program by the person or body designated in the regulations as an adjudicator for that purpose.

(2) The request shall be in writing and shall specify the grounds for the objection to the program.

31.-(1) Subject to the regulations, if any, the adjudicator may establish procedures for carrying out the review.

(2) The adjudicator shall review the program and shall,

- (a) confirm the program if it meets the criteria set out in section 27; or
- (b) amend the program so that, in the opinion of the adjudicator, it is consistent with the criteria set out in section 27.

(3) The adjudicator may make the decision based on the written submissions of the employer, bargaining agent, if any, and employees and is not required to hold a hearing.

(4) The adjudicator shall make only one decision on the program irrespective of the number of requests made for a review.

(5) The decision of the adjudicator is final.

33.-(1) An employee to whom a collective agreement applies may use the grievance or arbitration procedures under the collective agreement to decide any difference between the employee and his or her employer arising out of the interpretation, application, administration or alleged contravention of a program developed by the employer under this Part.

(2) In a grievance or arbitration under subsection (1), the arbitrator or board of arbitration shall not make any decision that an adjudicator is entitled to make under subsection 31 (2).

52. The provisions of this Act and the regulations prevail over the provisions of any other Act and the regulations thereunder but only to the extent necessary to carry out the intent and purposes of this Act.

SCHEDULE

1. The public sector in Ontario consists of,
 - (c) every board as defined in the *Education Act* (R.S.O. 1990, c. E.2), the Metropolitan Toronto School Board and the Ottawa-Carleton French-language School Board, including its public sector and its Roman Catholic sector; . . .
 - (j) any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Appendix to this Schedule or added to the Appendix by the regulations made under this Act.

APPENDIX

MINISTRY OF HEALTH

1. The Hospital Council of Metropolitan Toronto.

II. Positions of the Parties

4. The applicant submits that all four of the individual grievors were, at all relevant times, performing ICI construction work, and that the *Social Contract Act* does not apply to individuals performing work under I.C.I. agreements. Accordingly, all four of the grievors ought to have been provided with compensation increases contained in the Provincial Agreement. Counsel referred the Board to the definitions of "bargaining agent" and "employer" in the *Social Contract Act* and acknowledged that the applicant was a bargaining agent and that the responding party was an employer for the purposes of that Act. However, counsel submitted that, because of the definition

of “collective agreement” contained in the *Social Contract Act*, and in light of the Schedule to the Act and the Appendix to that Schedule, the I.C.I. agreement applicable to the applicant and the responding party is not captured by the *Social Contract Act*.

5. The term “collective agreement” is defined in section 2 of the *Social Contract Act* to mean “an agreement in writing between an employer and a bargaining agent providing for compensation of those covered by the agreement”. The term “employer” is defined to mean “an employer in the public sector”. Accordingly, submitted counsel, the I.C.I. agreement which binds the applicant and the responding party is not a “collective agreement” for the purposes of the *Social Contract Act* because the agreement is between the Mechanical Contractors Association of Ontario (hereinafter “M.C.A.O.”) and the Ontario Pipe Trades Council, and the M.C.A.O. is not, either in the Schedule to the *Social Contract Act* or the Appendix to the Schedule, designated as “an employer” for the purposes of that Act.

6. In further support of this argument, counsel noted that the Appendix to the Schedule of the *Social Contract Act* contained, as an “employer”, The Hospital Council of Metropolitan Toronto, an association of employers which negotiates collective agreements in the public sector. Counsel submitted that the Legislature had turned its mind to which employer associations would be deemed to be “employers” for the purposes of the *Social Contract Act* and, when it desired one to be included, it did so. Counsel submitted that the absence of the M.C.A.O. from the Schedule or Appendix to the Schedule of the *Social Contract Act* reflects a legislative determination that the M.C.A.O. ought not to be considered an “employer” for the purposes of the *Social Contract Act*.

7. Counsel for the applicant addressed the jurisdiction of the Board to entertain this grievance in light of the provisions of the *Social Contract Act* which establish adjudication of disputes under that Act. Counsel noted that, pursuant to section 126(3) of the Act, the Board has exclusive jurisdiction to determine a grievance concerning the interpretation, application, administration or alleged violation of the collective agreement applicable to the parties. This specifically includes the power to “interpret and apply the requirements of human rights and other employment-related statutes” as provided by section 45(8)3 of the Act.

8. Counsel reviewed section 33 of the *Social Contract Act* which delineates the jurisdiction between arbitrators and adjudicators under the *Social Contract Act*. Once again, counsel noted that the section makes reference to the concept of “collective agreement” which is defined narrowly by the legislation. Counsel reviewed with the Board the cases of *Porcupine Area Ambulance Service v. Canadian Union of Public Employees, Local 1484* (Dumoulin, January 10, 1994), *Leamington District Memorial Hospital v. Service Employees Union, Local 210* (Samuels, November 12, 1993), *Association of Allied Health Professionals: Ontario v. The Eastern Ontario Health Unit* (Eberlee, October 29, 1993), *The Etobicoke General Hospital v. The Association of Allied Health Professionals: Ontario* (O’Shea, January 31, 1994) and *Strathmere Lodge v. London and District Service Workers Union, Local 220* (Barton, July 4, 1994) in support of his proposition that the Board had jurisdiction to entertain this grievance.

9. Counsel also reviewed section 52 of the *Social Contract Act*, which he referred to as a “restrictive priority clause”. Counsel submitted that it is not necessary for the Board to interpret the *Social Contract Act* to determine this application, as the collective agreement in issue is not subject to the *Social Contract Act*. Alternatively, even if the collective agreement is affected by the *Social Contract Act*, counsel submits that the jurisdiction of an adjudicator under the *Social Contract Act* is limited to reviewing an expenditure reduction program for compliance with section 27 of the *Social Contract Act*, which is not in issue here. Counsel further argued that section 148(2) of the Act, which prohibits other agreements or arrangements from affecting provincial agreements,

was a “sign post” which should lead the Board to not apply the *Social Contract Act* in the circumstances, and that the sanctity of the provincial I.C.I. agreement could be maintained by the Board in compliance with section 52 of the *Social Contract Act*.

10. Counsel for the applicant proceeded, in the alternative, to consider what result should occur should the *Social Contract Act* apply to the fact situation at hand. The parties have agreed that Part VII of the *Social Contract Act*, the “fail safe provisions”, apply in the circumstances of this case. Accordingly, counsel points to section 23(2) of the *Social Contract Act* which makes Part VII inapplicable to employees who earn less than \$30,000 annually, excluding overtime pay. Two of the grievors, submitted counsel, are excluded from the terms of the legislation by this provision and ought to have received compensation increases in May, 1994. With respect to the other grievors who would earn more than \$30,000 annually, counsel, in accordance with his earlier argument, noted that section 24(4) of the *Social Contract Act* voids only increases in compensation under “collective agreements” which, he submits, did not occur here because of the definition of the term “collective agreement” contained in the *Social Contract Act*.

11. The responding party submits that the Board lacks the jurisdiction to entertain this application on the grounds that the *Social Contract Act* provides a statutory procedure for grieving the actions of the employer. Counsel noted that the responding party had, pursuant to section 29 of the *Social Contract Act*, posted a program outlining the Board’s obligation to reach its expenditure reduction target, and that the union had not objected to that program as is permitted by the legislation. It was counsel’s position that, if such an objection had been made and not addressed to the satisfaction of the union, the union could then have applied under section 30 of the *Social Contract Act* for the appointment of an adjudicator or it could have grieved to arbitration any difference between the parties arising out of the interpretation, application, administration or alleged contravention of the program.

12. Counsel submitted that section 33(2) of the *Social Contract Act* precludes an arbitrator from making a decision that an adjudicator is entitled to make, and posits that adjudicators have broad jurisdiction which includes answering the issues raised by the union’s grievance.

13. With respect to the applicability of the *Social Contract Act* to the employer, counsel referred the Board to section 4 of that Act, in which the legislation is said to bind all employers, employees and bargaining agents in the public sector. Quite simply, its position is that the four grievors in question are “employees” of the employer and that they, just like all other employees of the Windsor Board, are bound by the provisions of the *Social Contract Act*.

14. With regard to the application of the *Social Contract Act* to individuals earning less than \$30,000 per year, it is the employer’s position that this determination must take into account all of an employee’s “personal income” earnings from all employers during the year. On such an interpretation, counsel submitted that the determination of whether an individual is protected by section 23(2) of the *Social Contract Act* cannot occur until after the fiscal year of the employer has been completed. At that time, should the Board be required to do so, compensation increases to the maximum \$30,000 threshold would be made. Counsel referred to *Diane Whiteside v. The City of London* (Swimmer, Social Contract Adjudicator, August 12, 1994) and *O.P.S.E.U. v. Ontario Council of Regents for Colleges of Applied Arts and Technology* (McKechnie, Social Contract Adjudicator, July 13, 1994).

III. Decision

(a) Jurisdiction of the Board

15. It is appropriate to commence our decision by determining the extent of the Board's jurisdiction to hear and decide this application. As noted above, it is the responding party's position that the remedy requested by the applicant is beyond the jurisdiction of the Board to order.

16. Part VII of the *Social Contract Act* contains the "fail safe provisions" of that Act. Section 24 of the *Social Contract Act* fixes the rate of compensation to be paid to employees and addresses particular scenarios through to March 31, 1996. Should the fixing of compensation under section 24 not result in an employer achieving its expenditure reduction target, the employer is to make all reasonable efforts to achieve its target by utilizing unpaid leaves of absence or special leaves and, as well, is to develop a program setting out the manner in which these leaves are to be implemented. A written summary of the program is to be prepared and posted in the workplace (see sections 25 to 29 of the *Social Contract Act*). These steps were adopted by the responding party before us.

17. Section 29(3) of the *Social Contract Act* provides a bargaining agent which objects to a posted program ten days to request in writing that the employer amend the program. If the employer reviews the program but determines not to change it, or changes it but the bargaining agent is still of the view that it does not satisfy the statutory criteria under which the program must be determined (i.e. section 27(2)), the bargaining agent may request a review of the program by an adjudicator under that statute. Section 31(2) of the *Social Contract Act* sets out the powers of an adjudicator under that legislation:

31(2) The adjudicator shall review the program and shall,

- (a) confirm the program if it meets the criteria set out in section 27; or
- (b) amend the program so that, in the opinion of the adjudicator, it is consistent with the criteria set out in section 27.

Furthermore, section 33 of the *Social Contract Act* speaks to the role of grievance arbitration:

33(1) An employee to whom a collective agreement applies may use the grievance or arbitration procedures under the collective agreement to decide any difference between the employee and his or her employer arising out of the interpretation, application, administration or alleged contravention of a program developed by the employer under this Part.

- (2) In a grievance or arbitration under subsection (1), the arbitrator or board of arbitration shall not make any decision that an adjudicator is entitled to make under subsection 31(2).

It will be recalled that the applicant focuses much of its argument on the definition of "collective agreement" contained in the *Social Contract Act*. For the purposes of this aspect of the decision, we will assume that the collective agreement which affects the applicant and the responding party is a "collective agreement" for the purposes of the *Social Contract Act*.

18. It was the responding party's argument that the applicant ought to have challenged the program posted by the responding party and requested an adjudicator to review the program if it had concerns about the treatment of the four grievors. Additionally, counsel submitted that the issues in dispute before the Board were decisions "that an adjudicator is entitled to make under subsection 31(2)" of the *Social Contract Act* and, therefore, that we were without jurisdiction to

rule on the grievance. Counsel submitted that adjudicators had “broad jurisdiction” under the *Social Contract Act*.

19. We disagree with counsel’s submissions regarding the Board’s jurisdiction to entertain this grievance. It is evident to the Board that the Legislature anticipated that there would be disputes of a “jurisdictional-type” nature resulting from the passage of the *Social Contract Act* between adjudicators appointed pursuant to that legislation and boards of arbitration appointed pursuant to the terms of a collective agreement or, possibly, pursuant to (sections 46 and 126 of the Act, for example). In our view, section 31(2) of the *Social Contract Act*, in conjunction with section 33(2) of that Act, makes it quite clear that a board of arbitration may determine any dispute regarding the interpretation, application, administration or alleged contravention of a program except to the extent that such a determination would require the board of arbitration to assess whether the program meets or is consistent with the statutory criteria contained in section 27 of the *Social Contract Act*. That latter authority is vested in an adjudicator appointed pursuant to the *Social Contract Act*. This conclusion is consistent with the thrust of the arbitral authorities cited by the applicant in argument, reproduced above at paragraph 8.

20. In this case, we are not being asked to assess the responding party’s program which was posted pursuant to section 29 of the *Social Contract Act*. Indeed, the applicant’s position from the outset has been that the program does not apply to its employees performing I.C.I. work for the responding party. The issue before us is just that - does the *Social Contract Act* apply to the factual circumstances outlined above in paragraph 2 and, in either case, have the terms of the Provincial I.C.I. Agreement been violated by the responding party. These issues are entirely within our jurisdiction as a board of arbitration convened pursuant to section 126 of the Act, and we hereby so determine.

(b) Application of the Social Contract Act to the Responding Party

21. We have considered the arguments of both counsel quite carefully and we conclude that the terms of the *Social Contract Act* apply to the members of the applicant performing work in the I.C.I. sector of the construction industry for the responding party. We set out our reasons for this conclusion below.

22. We commence our analysis by considering the provision of the *Social Contract Act* which delineates those persons bound by the legislation, that being section 4, which provides as follows:

This Act binds the Crown in right of Ontario and all employers, employees, and bargaining agents in the public sector.

It is manifest from the terms of section 4 (subject to the discussion below regarding the definition of some of the terms contained therein) that the Legislature intended the *Social Contract Act* to have broad application to public sector employers, employees, and bargaining agents. No specific exclusions from the scope of the legislation are readily apparent from the terms of section 4.

23. As noted above, counsel for the applicant constructed an elaborate argument, based upon the definition of the terms “employee”, “employer”, “collective agreement” and “bargaining agent”, as well as the structure of the Schedule and the Appendix to the Schedule of the *Social Contract Act*, to support his view that the I.C.I. agreement governing the parties is not subject to the *Social Contract Act*. This argument, although ingenious, must, in our view, fail. The argument, in essence, pivots upon the definition of “employer” which reads as follows:

“employer” means an employer in the public sector.

The Schedule to the *Social Contract Act* defines the “public sector” in Ontario and includes:

every board as defined in the *Education Act* (R.S.O. 1990, c. E.2), the Metropolitan Toronto School Board and the Ottawa-Carleton French-language School Board, including its public sector and its Roman Catholic sector

as well as:

any authority, board, commission, corporation, office, person or organization of persons, or any class of authorities, boards, commissions, corporations, offices, persons or organizations of persons, set out in the Appendix to this Schedule or added to the Appendix by the regulations made under this Act.

There is no dispute that the responding party, as a Board of Education, is encompassed by the Schedule to the *Social Contract Act*. There is also no dispute that the M.C.A.O. is *not* located in the Schedule or the Appendix to the Schedule of the *Social Contract Act*. The essence of the applicant’s argument is that the Provincial Agreement is not a “collective agreement” for the purposes of the *Social Contract Act* because the M.C.A.O. is not “an employer” in the public sector.

24. We agree that the M.C.A.O. is not, for the purposes of the *Social Contract Act*, “an employer”. But this does not end our inquiry, because the legislation provides that a “collective agreement” exists, for the purposes of that legislation, if it is an agreement in writing between *an* employer in the public sector and a bargaining agent. In our view, the Provincial Agreement is such an agreement.

25. It is, perhaps, helpful at this point to briefly outline the province-wide bargaining structure which is characteristic of the I.C.I. sector of the construction industry in the Province of Ontario. Sections 139(1), (2), 144 and 145 of the Act read as follows:

139.-(1) In this section and in sections 137 and 140 to 155,

“affiliated bargaining agent” means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency; (“agent négociateur affilié”)

“bargaining” except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in the definition of “sector” in section 119; (“négociation”)

“employee bargaining agency” means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union; (“organisme négociateur syndical”)

“employer bargaining agency” means an employers’ organization or group of employers’ organizations formed for purposes that include the representation of employers in bargaining; (“organisme négociateur patronal”)

“provincial agreement” means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the

affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial or institutional sector of the construction industry referred to in the definition of "sector" in section 119. ("convention Provinciale")

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry, referred to in the definition of "sector" in section 119, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

144. Where an employee bargaining agency has been designated under section 141 or certified under section 142 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

145. Where an employer bargaining agency has been designated under section 141 or accredited under section 143 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 129 of an employers' organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry, referred to in the definition of "sector" in section 119, represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 141 or accreditation under section 143.

The effect of these provisions was outlined by the Board in *Beckett Elevator Company Limited* [1982] OLRB Sept. 1244, at paragraphs 14 and 15:

14. For some years commentators have suggested that instability in construction industry labour relations could be attributed to an unstable economic environment, and to unduly fragmented collective bargaining institutions. (See, generally: H. Carl Goldenberg, Q.C. and J. H. G. Crispo, Editors, *Construction Labour Relations*, Canadian Construction Association 1968; H. D. Woods "Memorandum on the Industrial Relations Features of the Problem" in H. Waisberg J. *Report of the Royal Commission on Certain Sectors of the Building Industry*, Queen's Printer, Toronto, 1974; J. B. Rose, *Public Policy Bargaining Structure and the Construction Industry*, Butterworths, Toronto, 1980; and specifically, D. E. Franks, *Report of the Industrial Enquiry Commission Into Bargaining Patterns in the Construction Industry*, 1976.) The proposed solution was extended area bargaining, and the new province-wide bargaining scheme reflects a legislative acceptance of that prescription. In 1978, the Legislature fundamentally altered the structure of collective bargaining in the construction industry by introducing a system of province-wide bargaining, by trade, through employer and employee bargaining agencies designated by the Minister of Labour. Previously, the only way that an employer association could acquire bargaining rights was through the acquiescence of the employers concerned, or through the process of "accreditation" (sections 125 to 134 of the Act). In order to be accredited, the employer association had to show that it represented the majority of the employers, employing a majority of the employees represented by a particular trade union. In this respect, the procedure was roughly analogous to the certification of a trade union. Under the new system, however, there is no requirement for a showing of support. The Minister is given a broad authority to designate such employer or employee bargaining agencies as he sees fit in accordance with his own assessment of the requirements of the situation (which may, of course, include the representatives of

the employer association). But having endorsed the proposition that extended area bargaining is more conducive to industrial relations stability, the Legislature has also sought to protect the individual employer's authority to deal with his own employees, subject to the terms of the province-wide collective agreement. The employer's rights are vested in the designated bargaining agency *only for the purpose of collective bargaining and concluding a provincial collective agreement*. The day to day relationships between the employer and his employees, the administration of the collective agreement, and the application of that collective agreement to the circumstances of individual employers, are all left for resolution at the local level - subject only to the injunction that there cannot be a local arrangement inconsistent with the provincial agreement (see section 146 of the Act). Thus, while recognizing the necessity of vesting considerable authority in the employer association for the purposes of collective bargaining, the Legislature has sought to limit that authority to the conduct of bargaining. In addition, the designated bargaining agencies are both under a statutory obligation to represent their constituents in a manner that is neither arbitrary, discriminatory, nor in bad faith (see section 151).

15. The new province-wide bargaining scheme is an attempt to reconcile different and potentially competing concerns: the need for extended area bargaining in order to promote industrial relations efficiency; and the desire to recognize, to some degree, the autonomy of the individual employer. Both objectives are important, and it is hardly surprising that the Legislature should attempt to strike a balance between them - especially since, on the "employer side", the interests at issue may be much more diverse than on the "union side" where, by definition, all of the union locals represented by the designated employee bargaining agency must be affiliated to a common trade union parent (although even on the "union side" there is sometimes competition between locals and friction with the employee bargaining agency). The employers represented by the designated employer bargaining agency may be active competitors in the market-place, with diverse and conflicting interests, and may not even be members of the employer association with the statutory right to represent them. Thus, the Statute provides that the employer association has the right to negotiate the agreement in the first instance, there is a prohibition against local arrangements, and the employer association has access to this Board under section 124/or section 89 in order to ensure that the system is being maintained and the agreement is being uniformly administered. By the same token, however, the local union (affiliated bargaining agent) and employer have access to this Board under section 124, the Statute restricts the role of the designated bargaining agents to "conducting bargaining and concluding a provincial agreement," and there is a statutory duty of fair representation.

26. The M.C.A.O. was designated by the Minister of Labour as an Employer Bargaining Agency on April 3, 1978. It represents a number of employers performing mechanical work in the I.C.I. sector of the construction industry (including, of course, the responding party: see *The Board of Education for the City of Windsor* [1983] OLRB Rep. May 831). However, as is clearly evident from sections 139, 144 and 145 of the Act, the M.C.A.O. is vested with all of the rights, duties and obligations of the employers which it represents, but *only* for the purpose of conducting bargaining and concluding a provincial agreement. Once the Provincial Agreement in question was concluded, the M.C.A.O. largely exits from the picture for the purposes of day-to-day employment relationships, and the Provincial Agreement becomes one which binds all of the individual employers, *individually*, for which the M.C.A.O. bargained. In fact, article 25 of the Provincial Agreement specifically provides that "... contractors prior to hiring U.A. members will be bound by this Agreement ...".

27. In these circumstances, we are of the view that the Province-wide I.C.I. agreement which binds the applicant and the responding party is a "collective agreement" for the purposes of the *Social Contract Act*. The M.C.A.O. Provincial Agreement is an agreement in writing "between an employer in the public sector" (i.e. the Windsor Board) and a bargaining agent as defined by the *Social Contract Act*. We do not believe that this result leads to the conclusion that section 148(2) of the Act has been violated. There still is only one Provincial Agreement which affects the parties to this grievance. No one has made more than one. In any event, to the extent that the result could be interpreted to be in violation of section 148 of the Act, it would be permitted by

section 52 of the *Social Contract Act*. In our view, the provisions of the *Social Contract Act* apply to the four employees.

(c) Application of the “Fail Safe Provisions” to the Employees in Question

28. As noted above, the parties disagree on the applicability of the “fail safe provisions” of the *Social Contract Act* to the four employees in question. On the basis of our conclusion above, and the terms of paragraph 6 of the Agreed Statement of Facts, there is no dispute that the provisions of the *Social Contract Act* apply to Messrs. Ridley and Hutton, as they have earned in excess of \$30,000 per year while employed with the Windsor Board. The remaining dispute lies with the status of Messrs. Nielson and Leach, who have not earned \$30,000 while in the employ of the Windsor Board.

29. Section 23(2) of the *Social Contract Act* provides that the “fail safe” provisions of the legislation do not apply to “employees” (which we have found both Mr. Nielson and Mr. Leach to be, for the purposes of the *Social Contract Act*) who earn “less than \$30,000 annually, excluding overtime pay”. The narrow question before us is whether that reference applies to earnings from public sector employers only, or includes, as well, the earnings of Mr. Nielson and Mr. Leach from *other* employment sources. In our view, such other personal income earnings should not be a factor in determining the legislated \$30,000 threshold.

30. Without a doubt, the intention of the Legislature as reflected by the wording of the *Social Contract Act* is far from clear. The preamble to the *Social Contract Act* focuses on a legislative desire to achieve significant savings in public sector expenditures, with “protection for those earning less than \$30,000 a year”. The term “year” is defined in the legislation as meaning the period beginning in April and ending with March 31 in the following year, unless otherwise provided by regulation. The corresponding provision of the legislation which reflects this goal, section 23(2), speaks of individuals earning less than \$30,000 “annually” - which is *not* a defined term in the legislation and which could, arguably, be intended to have meant something different than “year”, as the Legislature could easily have otherwise substituted that word for the word “annually” in section 23(2).

31. Nonetheless, it is apparent to the Board that the Legislature, when enacting the *Social Contract Act*, did not intend to include in the \$30,000 threshold those sums of employment compensation earned beyond the scope of the public sector. The legislation does not in any way permit for or require the disclosure of this information to an employee’s public sector employer, nor does it provide a method for resolving disagreements or differences regarding the value of such “private sector” compensation. It is apparent to us that, when the legislation refers to \$30,000 “annually”, it does so with the intention of referring solely to the compensation earned by an “employee” under the *Social Contract Act* - that is, to “an employee of an employer in the public sector”, and therefore would encompass only income earned in employment with the public sector, on an annual basis. It is unnecessary for us to determine what the proper “annual” period is as, on the agreed upon facts, it is clear that neither Mr. Nielson nor Mr. Leach earned \$30,000 with the Windsor Board prior to September, 1994, the anticipated completion date for the capital projects, and therefore they ought to have been provided with the increases provided for in the Provincial Agreement effective May 1, 1994. The applicant ought to have been provided with any corresponding increases in contributions, deductions and allowances provided for in the Provincial Agreement. To the extent that neither the grievors nor the applicant have been provided with these increases under the Provincial Agreement, the Windsor Board is in violation of the Provincial Agreement.

32. Accordingly, this grievance is allowed, to the extent referred to above. We anticipate

that the parties should be able to agree on the quantum of damages. However, this panel of the Board shall remain seized of this matter should the parties not be able to reach an agreement regarding compensation.

2637-94-JD Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 493, Applicants v. International Brotherhood of Electrical Workers, Local 1687 and D. J. Venasse Construction Limited and **Comstock Canada**, Responding Parties

Construction Industry - Jurisdictional Dispute - IBEW and Labourers' union disputing assignment of work in connection with installation of duct or trench similar to Trenwa Duct for exclusive purpose of housing electrical cables - Board decision in *Adam Clark* case not determinative of issue - Board confirming employer's assignment to Labourers' union

BEFORE: D. L. Gee, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

APPEARANCES: John Moszynski and Art Adams for the applicant; Laurence C. Arnold, Larry Lineham and Ralph Tersigni on behalf of IBEW Local 1687; Robert Baldwin on behalf Venasse Construction Limited; Denis Flynn and Yvon Kermen on behalf of Comstock Canada.

DECISION OF THE BOARD; March 14, 1995

1. This matter is a jurisdictional dispute filed pursuant to the provisions of section 93 of the *Labour Relations Act* (the "Act").
2. The work in dispute is the installation of duct or trench similar to Trenwa Duct, for the exclusive purpose of housing electrical cables, including computer cables, at the Trans-Canada Pipe Lines Compressor Station near Sundridge, Ontario, including the installation and levelling of the U-bracket supports, the installation and levelling of the precast concrete sections which form the walls of the system, the cutting of the slabs with a concrete saw where the ducting or trenching is to be angled and all off-loading and handling of the duct or trench work materials.
3. The parties filed consultation briefs in advance of the hearing. In addition, the Board heard the parties oral submissions. Having regard to the material filed and the submissions made in the circumstances of this case the Board has determined that it is not necessary to hear any *viva voce* testimony.
4. Counsel for the International Brotherhood of Electrical Workers, Local 1687 ("Local 1687") submits that, in the case of *Adam Clark Company Ltd.*, [1994] OLRB Rep. Jan. 1, the Board determined that the installation of a trench which is solely intended to hold electrical cable is, according to trade practice, to be installed by electricians and is determinative of the issue before us. The applicant submits that the Board's determination in *Adam Clark* was made in the absence of any evidence of employer practice, limited area practice and is limited to Board Area 2. The applicant submits that *Adam Clark* is thus of little assistance in determining the instant jurisdictional dispute.

5. We have carefully considered all of the material before us and the submissions of the parties and have determined that the position of the applicant must prevail.

6. We do not accept that the determination reached by the Board in *Adam Clark* is determinative of the issue before us. The Board in *Adam Clark* reviewed only the area practice in Board Area 2. The job site in issue here is located in Northern Ontario in what is known as the white area. We are concerned with a different employer and hence potentially different employer practice and preference.

7. Based on the evidence before us, we are of the view that neither of the applicable collective agreements of the two trade unions, nor the jurisdictional claims of the two trade unions, favour either union. This is an area of work where there is an overlap in jurisdiction. Similarly, we are of the view that the factors of skill and ability or economy and efficiency do not favour one union over the other. The determination of this jurisdictional complaint thus comes down to area and employer practice and employer preference.

8. In the present case, the evidence with respect to employer practice establishes that both Comstock Canada and D. J. Venasse Construction Limited have previously assigned similar work to the labourers. The evidence with respect to area practice, when viewed from the perspective most favourable to Local 1687, indicates that the practice is mixed. The employer's preference, expressed by its assignment of the work, would appear to be that the work be performed by labourers.

9. There is nothing before the Board which suggests that the work in dispute should have been assigned to electricians. We therefore see no reason to disturb the assignment made to the Labourers.

1551-94-R United Steelworkers of America, Applicant v. Consumers Distributing, Responding Party

Adjournment - Certification - Charges - Employer Support - Evidence - Intimidation and Coercion - Membership Evidence - Board explaining decision to have vice-chair sit alone to hear and determine certification application where parties requesting inclusion of Board Members on panel - Board explaining decision not to adjourn hearing in order to provide further notice to objecting employees who had failed to attend hearing - Board declining to hear evidence of alleged managerial involvement in organizing campaign on ground that facts pleaded not disclosing *prima facie* case for application of section 13 of the Act - Board not persuaded that union membership evidence obtained through misrepresentation as alleged by employer - Certificate issuing

BEFORE: *Russell G. Goodfellow*, Vice-Chair.

APPEARANCES: *Brian Shell, Mark Rowlinson, Brando Paris* and *Heather Alden* for the applicant; *Michael Horan, Terry Olmstead, Rosanne Angotti* and *Charles Marful* for the responding party.

DECISION OF THE BOARD; March 10, 1995

1. This is an application for certification.

2. On September 26, 1994, the Board issued a “bottom line” decision rejecting the respondent’s allegations of impropriety in the applicant’s organizing campaign and certifying the applicant on the basis of the documentary evidence of membership filed with the Board. These are the reasons for the Board’s decision, including certain determinations made at the outset of the proceedings.

“PRELIMINARY” MATTERS

I. Configuration of the Panel

3. This case was originally scheduled to be heard by a panel consisting of the undersigned and Board Members W. H. Wightman and J. Redshaw. During the course of the parties’ opening submissions, however, it became apparent that the number of days required to hear the case would exceed the number of consecutive sitting days available to the Board Members. As an application for certification, the case falls within the Board’s “fast track” scheduling system and, as indicated in the notice of hearing sent to the parties, is scheduled to be heard on consecutive days, from Monday to Thursday, until complete. Accordingly, at a break in the proceedings, and prior to the calling of any evidence, the matter was reviewed with the Registrar. As a result of this review, it was determined that there were no other Board Members available to commence the case that day, or at any time that week, and continue with it until its completion on an expedited basis. I was then assigned to hear the case alone, and the parties were so advised following the break. The reason given for the change in panel was “scheduling difficulties”.

4. Shortly thereafter, counsel for the union made a request for the inclusion of Board Members on the panel, regardless of any delays this might create in the scheduling of the case. After counsel for the employer signified his client’s agreement with this request, I adjourned the hearing to review the matter with the Chair.

5. Section 104(12) of the Act states in part:

104.-(12) Despite subsections (9), (10) and (11), the chair may sit alone or may authorize a vice-chair to sit alone in any of the following circumstances to hear and determine a matter and to exercise all the powers of the Board when doing so:

1. In the case of a matter respecting section 11.1, 69, 70, 73.1, 73.2 or 92.1, subsection 92.2(1) or (6) or section 94, 95, 126 or 137,
 - i. if the chair considers it advisable to do so, or
 - ii. if the parties consent.
2. In the case of any other proceeding,
 - i. if the chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so, or
 - ii. if the parties consent.

It was the view of the Chair that this was an appropriate case for the exercise of her discretion in accordance with sub-paragraph 2(i) of this provision.

6. At the stage of proceedings at which the Chair’s decision was made, the parties were contemplating calling as many as 15-20 witnesses over almost as many hearing days. Given the prior commitment of Board Members to other proceedings, and the usual exigencies of the scheduling process, assembling a three-member panel in these circumstances could have meant a hearing

that would take months, rather than weeks, to complete. In labour relations matters, that kind of delay, occasioned solely by the scheduling process, is undesirable; in the context of certification proceedings, it is untenable.

7. In *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) et al* [1993] 2 S.C.R., Cory J. recently commented on the importance of expedition in the resolution of labour relations disputes, as follows:

Unresolved disputes fester and spread the infection of discontent. They cry out for resolution. Disputes in the field of labour relations are particularly sensitive. Work is an essential ingredient in the lives of most Canadians. Labour disputes deal with a wide variety of work related problems. They pertain to wages and benefits, to working conditions, hours of work, overtime, job classification and seniority. Many of the issues are emotional and volatile. If these disputes are not resolved quickly and finally they can lead to frustration, hostility and violence. Both the members of the work force and management have every right to expect that their differences will be, as they should, settled expeditiously. Further, the provision of goods and services in our complex society can be seriously disrupted by long running labour disputes and strikes. Thus society as a whole, as well as the parties, has an interest in their prompt resolution.

Legislators have recognized the importance of speedy determination of labour disputes. By the enactment of labour codes they have sought to provide a mechanism for a fair, just and speedy conclusion of the issues. The legislators have gone further and attempted to insulate the decisions of the various labour boards, tribunals and arbitrators from review by the courts. In earlier times, the courts resisted legislative attempts to restrict their ability to review the decisions of various labour boards. However, over a period of time they have accepted the vital importance of labour tribunals and adopted a more restrained approach in reviewing their decisions.

Expressed in the context of arbitral proceedings, these comments apply with even greater force to certification applications where the very right to representation hangs in the balance.

8. It is an unhappy fact of our system of labour relations that organizing campaigns are frequently divisive affairs, pitting not only employer against union but employee against employee. Persons who have exercised their statutory rights by expressing their wishes in favour of unionization fear retaliation from the employer, and employees who have opted not to do so may be ostracized, or worse, by their colleagues. In the short run at least, the result is an often pathologically divided workplace which is sharply at odds with certain of the purposes of the Act (e.g. the promotion of "harmonious labour relations" set out in section 2.1). It is for reasons such as these that the Legislature made a number of recent amendments to the Act which are designed to ensure expedition in the resolution of disputes (see e.g. sections 92.2 and 104(14)), and which include section 104(12).

9. The nature of the discretion exercised by the Chair in accordance with this provision was discussed in *Robert Dumeah*, [1994] OLRB Rep. June 655, as follows:

7. The statutory scheme set out in subsections 104(12) and (12.1) of the Act grants to the Chair (or Alternate Chair) a discretion in determining the composition of the Board in a particular proceeding. The exercise of this discretion is an executive act, made on a purely administrative basis.

Some of the reasons for this broad administrative discretion were outlined in the following passage:

9. There may be occasions where scheduling problems or other difficulties in constituting a tripartite panel can lead to undue delay or other prejudice to a party. One purpose of these new legislative provisions was to deal with this problem, to provide the Chair with the ability to ensure that Board hearings proceeded expeditiously, consistent with the truism that "labour relations delayed is labour relations denied". It would be inconsistent with that purpose if the Chair had to afford an opportunity to parties to a proceeding to participate in the decision as to

whether a single Vice-Chair sits alone or not. Parties would have to be given adequate notice of the decision of the Chair that she might exercise her discretion, a meaningful opportunity to participate in the process, and arguably, reasons for the Chair's eventual decision. To read the statutory scheme as requiring such a process would undermine the very purpose of the scheme. Hearings would inevitably be further delayed if the Chair considered exercising her powers to reduce delay.

10. Section 104(12)1 limits the Chair's discretion to where the "Chair considers it advisable". This is a general, unrestricted discretion which in essence depends upon the Chair's opinion. And it is only the "possibility" of undue delay or prejudice which need be present under section 104(12)2. The powers in this subsection are thus dependent, if at all, upon the opinion of the Chair as to whether a possibility of undue delay or other prejudice is present. It is the mere possibility that triggers section 104(12)2, and it is solely the Chair who is to consider this possibility.

11. When the particular language is considered, in the context of the overall scheme for constituting panels, and in light of the purpose of the Board and of section 104(12), the decision exercised by the Chair, pursuant to section 104(12), is properly characterized as purely administrative in nature. The Chair need not provide an opportunity to the parties to the proceeding to participate in this decision, nor is the Chair required to issue written reasons justifying the exercise of her discretion. To require either of these actions would effectively defeat the very purpose of the statutory amendment. Accordingly, I ruled at the hearing that the case would proceed before me.

10. In the circumstances of this case, it was the "possibility of undue delay" that gave rise to the exercise of the Chair's discretion and the determination that I would hear the case alone. Accordingly, following the break, I advised the parties that their request was denied.

II. Notice to Employees

11. Prior to the reconfiguration of the panel, counsel for the employer raised an issue concerning notice to employees of the hearing. Counsel directed our attention to the following letter to the Board dated August 8, 1994:

To Whom it May Concern;

On July 29, 1994, a meeting was held at Mark & Larry's (3482 Lawrence Avenue East, Scarborough) to discuss the possibility of introducing a union at the Consumers Distributing store (629 Markham Road, Scarborough).

The meeting, chaired by Brando Paris, Organizer of United Steelworkers of America, was convened at 5:00 p.m. and ended at 6:00 p.m.

During this one-hour period, we were given a 3" x 5" (approximately) card to complete and sign (name, address, telephone number, company name, job function and date).

Mr. Paris told us that once these cards were signed, he "would get things rolling." We were not made aware that these were union pledge cards and that signing these cards would constitute a vote for the union. We were under the impression that by signing, we were *expressing interest* in a union, only.

We fully expected that more information would be made available to us at a future date, i.e. other meetings, literature, etc.

We feel we were mislead and tricked into this situation.

We do not wish to become members of the United Steelworkers of America union or any other union.

Consumers Distributing has been a good and fair employer and we enjoy a good relationship with our management and co-workers.

We, the undersigned, have read and agree with the contents of this letter.

This letter was signed by 13 people purporting to be employees of the respondent. There are 19 employees in the agreed-upon bargaining unit. The letter was received by the Board on August 9, 1994, and is shown as having been copied to the employer's District Manager for Toronto East, Mario Curutti.

12. Counsel for the employer advised the Board that only two of the 13 signatories to the letter were in attendance at the hearing. Counsel suggested that the reason the others may not have been present was because they had been told by the Board that they could not participate. Counsel referred us to the following letter from the Registrar of the Board to Christine Kimberley, the employee whose name appeared on the return address of the August 8, 1994 letter:

August 10, 1994

Receipt is acknowledged of statements of desire dated August 8, 1994 with respect to the above-noted application for certification

Section 8(4) of the *Labour Relations Act* states:

8.-(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. *Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.*
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by re-applying for membership or by otherwise expressing a desire to be represented by a trade union.

The application date was July 29, 1994 and your statements of desire were sent by Courier on August 9, 1994 and received at the Board on August 9, 1994 after the application filing date. The Board is therefore unable to consider your statements of desire in connection with this application.

(emphasis added)

Implicit in counsel's submission was the suggestion that the Board adjourn the hearing to enable further notice to be provided to employees of the hearing and their right to participate.

13. After hearing the submissions of counsel for the union on this issue, the three member panel of the Board determined that sufficient notice of the hearing and the right to participate had been provided to employees through the posting of the Board's "green sheets" and through subsequent correspondence from the Board. These sheets, which are posted in the workplace, advise employees of: the application for certification; the bargaining unit applied for; the need for any evidence of withdrawal or re-affirmation of support for the trade union to have been filed by the

application date; and the requirement to attend at the hearing in support of such evidence. The green sheets also state:

5. If you wish to participate in these proceedings with respect to an issue *other than* a petition or re-affirmation, you must file with the Board by **[Date]** a written statement which sets out your name(s), address and phone number, the file number at the top of this notice, the names of the union and the employer, why you want to participate and what you want to say to the Board. If you file such a statement, that statement may be sent to the other parties in this case, and your name(s) may be disclosed to them.

6. If you do not file a statement as set out in paragraph 4 or 5, or if the Board determines that your statement will not affect the result of the application, the Board may decide the application without further notice to you.

7. If you file a statement as set out in paragraph 4 or 5, an L.R.O. may contact you to discuss the issues in the application. You must also attend the L.R.O. meeting and the hearing, if any, or the Board may decide the application without further notice to you and without considering any document you may have filed.

8. A meeting with a Labour Relations Officer will take place in the Board Officers, 3rd Floor, 400 University Avenue, Toronto, Ontario on **[Date]**, at **[Time]** for the purpose of trying to settle all or part of this case if the case is not already settled by that date.

9. The hearing of the application will take place in the "Board Room", 5th Floor, 400 University Avenue, Toronto, Ontario, on **[Date]** at **[Time]** if the case is not already settled by that date, and it will continue on consecutive days from Monday to Thursday, excluding Fridays and holidays until completed or as the Board otherwise directs.

10. **THE PURPOSE OF THE HEARING**, if a hearing is held, is to hear the evidence and representations of the parties with respect to this application.

14. The panel was of the view that the Registrar had properly advised employees that the "statement of desire" not to be represented by the applicant contained in the August 8 letter could not be considered by the Board as it was filed after the application date. To the extent that the August 8 letter may also have expressed a wish to participate with respect to any other issue, the Board was satisfied that the notice provided by the green sheets had not been undermined by the Registrar's letter. That letter dealt solely with the kinds of evidence referred to in section 8(4), and neither informed employees of the right to make submissions on other issues nor purported to deprive employees of that right. Further, and as indicated by the file, the Registrar continued to communicate with Ms. Kimberley even after the August 10 letter, advising her, for example, of rescheduled hearing dates and correspondence received from other parties.

15. As a practical matter, it was also apparent to the Board that the representations contained in the employees' August 8 letter formed at least part of the subject matter of the employer's case and, to that end, the employer appeared to have intended to call most, if not all, of the employees as witnesses. In addition, at the time the notice issue was raised, neither of the two employees in attendance at the hearing signified any independent wish to participate in the proceedings; nor, for that matter, did Christine Kimberley when she was later called to testify.

16. Accordingly, the Board ruled that it would not adjourn the hearing to provide further notice to the employees.

III. The Relevance of the Respondent's "Managerial Evidence"

17. At the conclusion of these matters, the applicant made a preliminary motion that I should not hear the evidence the employer intended to call with respect to the alleged involvement

of certain managerial employees in the applicant's organizing campaign. It was the position of the applicant that the facts as pleaded by the employer did not disclose a *prima facie* case for the application of section 13 of the Act and could not otherwise cast doubt on the quality of the applicant's membership evidence.

18. After considering the parties' submissions on this issue, and after reviewing the pleadings and the relevant case law, I delivered the following oral ruling at the start of the second day of hearing:

"The parties agree that the respondent's case, as disclosed by the pleadings, contains essentially two sets of allegations: those which relate to the activities of two former assistant managers and a former manager (principally Brian Cheong) on behalf of the union; and those which relate to statements made to employees by a paid union organizer - Brando Paris. The respondent argues that the first set of allegations discloses that the union is one to which section 13 of the Act applies and/or that the voluntariness of the membership evidence is otherwise in doubt. The allegations relating to Mr. Paris are said to disclose material misrepresentations in the gathering of the membership evidence. On either basis, the respondent submits, the application must be dismissed.

As a preliminary matter, the applicant has asked the Board to determine that the allegations relating to the activities of the managerial employees do not make out a *prima facie* case for the relief requested. The union submits that the only issue is the application of section 13, and that the facts as pleaded do not disclose the mischief to which that provision is directed.

Based upon a review of the pleadings and having regard to the submissions of the parties, the Board has determined that it will not inquire into those aspects of the case which relate to the involvement of the managerial employees.

Dealing first with section 13, it is and has been the law for some time now that this provision will not apply unless the managerial employees can be said to be acting on behalf of management or, perhaps, can reasonably have been perceived to have been doing so by the employees whose support they were soliciting. It is clear both from the pleadings and from the respondent's submissions that neither of these circumstances obtain in the present case.

Beyond that, whether or not the involvement of one or more managerial employees in support of a trade union organizing campaign will call into question the voluntariness of the membership evidence turns on whether those individuals exercised any undue or coercive influence over employees to obtain their signatures on membership cards. It is no longer assumed, if it ever was, that the mere involvement of managerial employees in an organizing campaign on behalf of the trade union casts doubt on the quality of the membership evidence, where those employees are acting contrary to the interests of the employer. In this case, the pleadings do not disclose any such undue influence, nor have any employees made such representations.

Accordingly, the Board will restrict its inquiry in this matter to those allegations which relate to the activities of, and the representations made by, Mr. Paris."

19. To expand upon this ruling somewhat, it was evident both from the pleadings and from the submissions of counsel for the employer that the so-called "managers" were, to the knowledge of employees, acting contrary to the interests of the employer. Paragraph 10 of the employer's response states:

10. The organizing of employees in the bargaining unit has taken place with the assistance and support of a current and former manager and assistant manager of the Respondent for the announced purpose of getting back at the employer. Employees have been encouraged to sign membership cards for that purpose by persons of influence who are excluded from collective bargaining under Section 1(3) of the *Labour Relations Act*.

[emphasis added]

In answer to a subsequent request for particulars by the applicant, the respondent expanded upon this paragraph, in part, as follows:

- (c) At the time of the meeting at Mark & Larry's [at which all of the cards were signed], the employees were upset that Ms. Moody and Mr. Cheong had left the employ of the Respondent. At the meeting, both Mr. Cheong and Ms. Moody to employees to sign membership cards and told them that doing so would make the Respondent "mad" (sic).
- (d) employees were encouraged to sign membership cards to get the Respondent "mad" by Ms. Moody, Mr. Cheong and Ms. Cheong at the dates, times, and places outlined in this Appendix A.

[material in parenthesis added]

Ms. Cheong is Mr. Cheong's wife and the manager of another Consumers Distributing store. Mr. Cheong's employment with the company came to an end two days before the meeting at which the cards were signed. Ms. Moody was an assistant manager who had left the employ of the company some months previously.

20. As the Board's case law makes clear, these are not the kind of circumstances to which section 13 of the *Act* applies. This provision states:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.

21. The purpose of this provision was described in *Addidas Textile (Canada) Ltd.*, [1980] OLRB Rep. May 639, as follows:

6. . . . The purpose of the section, in keeping with the scheme of the Act, is to maintain the necessary arm's length relationship between employers on the one hand, and trade unions, as representatives of employees, on the other. In applying section [13], the Board has drawn a distinction between support tendered by the employer, either directly or through persons holding managerial positions within his organization, and support tendered by persons who occupy management positions but act on their own initiative against the employer's interest in support of the interests of the employees. Although a question may arise in these latter circumstances as to the voluntariness of the membership evidence, the necessary arm's length relationship between employer and trade union may not be undermined in a manner which requires the automatic application of the section [13] bar. In rejecting the automatic application of section [13] in these circumstances (as in the *Leamington Hospital* case, [1973] OLRB Rep. June 376) the Board stated at para. 14 of the *Children's Aid Society* case, *supra*:

. . . The Board recognizes that in the modern organizational setting interests of individual persons deemed to be managerial are not necessarily coincidental with those of the employer. If the evidence establishes that such persons acted on behalf or in the interests of the employer then undoubtedly the section [13] bar would apply. If, however, the evidence establishes that the persons were acting not on behalf of the employer but contrary to the wishes and interests of the employer (see *Air Liquide* case (1964 CLLC 16,002) then it cannot be said that the employer has participated contrary to section [13], or section [65] for that matter. Similarly, if the evidence establishes that the disputed persons have been acting in their self interest rather than on behalf of or in the interest of the employer, then again section [13] should not be activated.

See also *Waldorf Astoria Hotel*, [1981] OLRB Rep. Sept. 1308.

22. Further, there was nothing in the facts as pleaded (and counsel pointed to nothing more

substantial during oral submissions) to suggest that the “managerial” personnel had made any threats, or engaged in any coercive, or unduly influential conduct that might cause the Board to question the voluntariness of the signed membership evidence. Although the initial response to the applications contained a number of bald allegations of “threats”, “intimidation” and “coercion” of employees by Mr. Cheong, the applicant’s subsequent request for particulars generated, in relevant part, the following response:

Paragraph 11

The Respondent is aware that from August 5, 1994 to August 7, 1994, [i.e. *after* the cards were signed and the application submitted] Mr. Cheong telephoned at least the following employees at their homes: Laura Paddon, Dimitra Tzortzis, Leah Lambrakis and Doug Harrison. These telephone calls were made at various times throughout those days and evenings. On August 6, 1993, Mr. Cheong called both Leah Lambrakis and Dimitra Tzortzis as frequently as three times. On August 7, 1994, Mr. Cheong called Dimitra Tzortzis on five occasions. The Respondent has no knowledge of the exact time that these telephone calls were made. In these telephone conversations, Mr. Cheong told the employees not to back out of the union and warned them not to mention that he was involved in the union organizing. The employees were left with the impression that if Mr. Cheong’s name was mentioned in connection with the organizing activities he could go to jail.

[material in parenthesis added]

23. Assuming, but without deciding, that the activity described in this paragraph may have caused the Board to doubt the validity of the signed membership evidence had it occurred *prior* to the signatures having been obtained or the application having been filed, these were not the facts in this case. The conduct in question is alleged to have occurred well after the employees signed the cards and the application had been submitted. It could not, therefore, have been said to compromise the integrity of the signed membership evidence (see e.g. *Innovative Wood Products*, [1978] OLRB Rep. Feb. 161 and *Royalguard Vinyl Co.*, [1994] OLRB Rep. Aug. 1057).

24. In circumstances where the involvement of managerial employees in a trade union’s organizing campaign is not sufficient to trigger the section 13 “bar” to certification, the Board’s case law makes clear that “undue influence” cannot be presumed but must be established by “substantial evidence”. This is no doubt in recognition of the fact that employees will have little to fear from managers who are seen to be campaigning against the perceived interests of their employer; nor, for that matter will, they have much to gain from managers who are about to be, or have in fact been, fired.

25. In *National Dry Company Ltd.*, [1980] OLRB Rep. Aug. 1217, the Board stated:

12. . . . [Section 13] is intended to prevent the certification of unions which are in less than an arm’s length relationship with the employer. In other words, it is aimed at preventing the establishment of “sweetheart unions”. It is not uncommon for persons in the gray area at the fringes of management, like Mr. Rondana, whose precise employment status is not clear until a determination is made by this Board, to get involved, sometimes deeply, in a union. (See *Toronto Children’s Aid* [1976] OLRB Rep. Nov. 651; *Kelly Funeral Homes Limited*, [1973] OLRB Rep. Feb. 87; *S. D. Adams Welded Products Ltd.*, [1978] OLRB Rep. April 353). Less often, but occasionally, persons of clearly managerial rank lend their support to a union’s campaign to organize their employees. (See *Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. Feb. 130 [incorrect citation in original] affirmed in an unreported decision of the Supreme Court of Ontario (Divisional Court) dated July 11, 1978). That, of itself, does not raise a section [13] bar to certification, nor does it necessarily cast any doubt upon the validity of membership evidence. Where the evidence establishes that the foreman or manager was clearly acting contrary to the employer’s interests and would have been seen to be so motivated by any reasonable employee, the fundamental concern about a “sweetheart union” underlying section [13] of the Act does not arise. When that is the case the section [13] bar to certification does not arise and

there is no reason to presume, absent substantial evidence to the contrary, that the employees were subjected to undue influence in their decision to join a union.

(See also *Air Liquide* 64 C.L.L.C. ¶16,002; *Millwork and Building Supplies Company Limited*, [1968] OLRB Rep. June 273; *Acme Ruler Company Limited*, [1969] OLRB Rep. Nov. 952 and *Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. Feb. 130, aff'd July 11, 1978 (Div. Ct.).)

26. In this case, and apart from the foregoing statements, there was nothing in the initial response or in the subsequent particulars to support the employer's allegations of misconduct. Instead, the crux of the employer's case, as it related to the managerial employees, appears to have been captured by the first part of the following proposition set out in conclusion to its response to the applicant's request for particulars:

"The respondent states that the affected employees were *more responsive* to the entreaties of former managers whose representations, inducements and exhortations tainted the membership evidence of the Applicant".

(emphasis added)

27. From the Board's point of view, a heightened responsiveness to the entreaties of certain rogue managers, borne out of feelings of loyalty, friendship, or a simple desire to please, is not sufficient to cast doubt on the voluntariness of signed membership evidence. Employees are expected to be able to separate such emotions from their feelings towards unionization, or to weigh them appropriately in the balance, before signing a union card.

28. For all of these reasons, I ruled that I would not deal with the evidence concerning the alleged activities of the "managerial" employees.

Merits

29. The remaining issue was whether Brando Paris, a senior organizer for the applicant, made representations to employees that would cause the Board to doubt the integrity of the signed membership evidence. It was the position of the respondent, as set out in its pleadings, that Mr. Paris told employees at the card signing meeting that "they could get out of the union at anytime". The respondent submitted that this was a material misrepresentation that went to the heart of the membership evidence and should cause the Board to dismiss the application.

30. After hearing the evidence of the three employer witnesses who testified in support of this allegation, as well as that of Mr. Paris, I was unable to conclude that the representation set out in the employer's pleadings, or any similar representation, had in fact been made. The inconsistencies in the evidence of the employer's witnesses, when considered together with such factors as their demeanour when testifying, their apparent inability to resist the tug of self interest when shaping their answers or to recall events, and what was most reasonable and probable in all the circumstances, contributed to this conclusion. Without delving too deeply into the realm of speculation, it appeared to me that the employer's witnesses had experienced a classic "change of heart" and may have gone on to convince themselves that Mr. Paris was responsible for their predicament. In this connection, it is important to understand that all of the employer's witnesses are adults and none of them impressed me as being unable to understand the true meaning of their choices at the time they made them.

31. A number of facts were not in dispute. A meeting was held on July 28, 1994 at Mark

and Larry's Restaurant in Scarborough. The meeting had been arranged by Brian Cheong, and employees were aware that a union official would be present.

32. Mr. Paris arrived at the restaurant sometime before 4:30 and was introduced to employees shortly thereafter. By that time, as many as 10 to 15 employees were gathered around a large table; some were seated, some were standing, and a number of conversations appear to have been going on at once.

33. Mr. Paris began the meeting by saying that he would prefer to answer questions rather than to give a speech. At some point he also produced blank applications for membership. Early on, two employees asked whether they would lose their bonuses or hours of work if they joined the union. Mr. Paris replied that once the application was submitted, the "statutory freeze" would apply and the employer would be unable to alter the existing terms and conditions of employment. The two then asked to sign cards. Significantly, at that point, Mr. Paris cautioned the employees against signing the cards if they might be inclined to change their minds in two or three days. (Apparently, before attending the meeting, Mr. Paris had learned of another application the union had filed in respect of another Consumers Distributing store at Dixie Road and Dundas Street. That application was withdrawn after a substantial number of employees withdrew their support and the employer raised a number of allegations of misconduct.) After the employees indicated that they were certain of their decisions and would not change their minds, they signed the cards and left the meeting.

34. Thereafter, events became more murky. At some point, according to the evidence of the first employer witness, Leah Lambrakis, Laura Paddon, whom Ms. Lambrakis was sitting beside, asked "something like, just say in one or two weeks we want to back out, can we?" According to Ms. Lambrakis, Mr. Paris replied "yes" and Ms. Paddon looked relieved. Ms. Lambrakis also recalled that Mr. Paris "didn't force anyone to sign" and "told us to be 100 per cent sure and that it was totally our decision".

35. In cross-examination, Ms. Lambrakis recalled Mr. Paris' speaking about the Dixie and Dundas episode at about the same time as he referred to the need for 100 per cent certainty. Ms. Lambrakis said that it was also around that time that Ms. Paddon asked her question. Ms. Lambrakis also recalled that Mr. Paris informed the employees that the application would be filed the next day, that the employer would learn of it shortly thereafter, and that the employer might attempt to "come down hard" on the employees. In the latter event, employees were invited to contact Mr. Paris.

36. Ms. Lambrakis also testified that she read and understood the application for membership before signing it, and that she asked certain questions of her own relating to the jewellery commission and the privacy of the membership evidence. Ms. Lambrakis gave no indication as to whether she signed the membership card before or after Ms. Paddon asked her question, or whether Mr. Paris' answer made any difference to her own decision.

37. According to Ms. Lambrakis, over the course of the next week and, especially, after the green sheets were posted, a number of the employees started discussing the union, including some who hadn't attended the meeting. Ms. Lambrakis recalled copying the green sheets, taking them home to her father, and being asked why, as a part-time worker and 20 year old university student, she would want to become involved with a union. The message from Ms. Lambrakis' father was "what was so bad at work?" Ms. Lambrakis testified that another employee, Dimitra Tzortzis, with whom she attended the meeting also spoke to her parents, presumably to similar effect. According to Ms. Lambrakis, this was "the consensus that was building up at work".

38. In the week following the posting of the green sheets, Ms. Lambrakis said, the employees decided to hold another meeting. At that meeting the employees agreed that Christine Kimberley would write a letter to the Board to “get us out of this”. According to Ms. Lambrakis the purpose of the letter was to advise the Board that the employees “had thought about it and we really don’t want a union anymore”.


39. Laura Paddon testified next. She is 20 years old and lives on her own. Ms. Paddon said that some time after Mr. Paris arrived at the table, she asked him the following question: “If I choose to get out either in one day, one week, one month or six months, can I?” Ms. Paddon said that Mr. Paris replied “Yes, just phone me”. Ms. Paddon said that she asked this question because she does not live near her parents and she wanted to have an opportunity to discuss the matter with them. Based on Mr. Paris’ answer, Ms. Paddon felt that she could go home and decide “whether this thing was right for me”. Her assumption was that “I would no longer be involved in the union, by one phone call, and that if enough other people wanted this there would be no union at the store”.

40. Ms. Paddon said that the next time the subject of the union came up was in a conversation with Dimitra Tzortzis. Like Ms. Lambrakis Ms. Tzortzis had also spoken to her father about the union and together Ms. Paddon and Ms. Tzortzis decided that the union “wasn’t for us”. Ms. Paddon also said that, at about this time, “people started getting scared” and were concerned about “how to get out”. Ms. Paddon attributed this fear to information she received from other employees who had attended the meeting, including Christine Kimberley, that “we couldn’t get out just for the asking but had to write a letter to the Board”. At this point, Ms. Paddon said, she felt that she’d been lied to by Mr. Paris.

41. After a number of allegedly abortive attempts to obtain information from management or its solicitors about what to do, Ms. Paddon said that the employees decided to meet and write a letter to the Board. According to Ms. Paddon, the employees initially believed that individual letters had to be written, but were advised otherwise by Ms. Kimberley. According to Ms. Paddon the employees then collaborated on the drafting of the letter, before Ms. Kimberley took it away to complete the job. Ms. Paddon later reviewed and signed the August 8 letter before it was submitted.

42. Under cross-examination, Ms. Paddon’s evidence became significantly less definitive and, at times, contradictory. In her evidence-in-chief, she testified that Mr. Paris had said nothing about the timing of the application, only that he would “get things rolling”. In cross-examination, however, she acknowledged that he had said that the application would go in the next day. Further, her understanding of the meaning and effect of the card she signed appeared to vary. Initially, Ms. Paddon said that she understood from Mr. Paris that she would be permitted to withdraw her “membership” in the union, and later she acknowledged that she understood that the card was “a sign-up for membership in the union”. In between, however, Ms. Paddon was presented with a sample union card and claimed not to have understood it. She said that she thought it meant that employees would only be “getting information”. On one side, the card provides:

Ex 2.



UNITED STEELWORKERS
Membership — Ontario

YES, I apply for and accept membership in the
United Steelworkers of America.

SIGNATURE OF APPLICANT

Date. _____ 19 ____

43. It was also only under close questioning that Ms. Paddon admitted having been told by Mr. Paris “something along the lines of being 100 per cent sure, and if you’re going to change your mind in two or three days then don’t sign”. According to Ms. Paddon, however, this statement was supplemented by the explanation that, “it’ll cost me more paperwork”. Ms. Paddon said that Mr. Paris’ reference to two or three days was why she asked about “*six months*”. Indeed, during cross-examination, the time frame for Ms. Paddon’s possible departure from the union assumed consistently more lengthy proportions and, on one occasion, even included a reference to one year. It is noteworthy as well that Mr. Paris’ alleged representation, upon which so much appeared to turn in Ms. Paddon’s mind, did not find its way into the employees’ August 8 letter to the Board, even though Ms. Paddon said that she contributed to the initial preparation of the letter and read and signed it before it was submitted. When asked about this apparent inconsistency, Ms. Paddon said that she “didn’t think [the statement] needed to be in the letter” and that “the letter didn’t seem very strong”.

44. Also during cross-examination, Ms. Paddon gave contradictory answers about the role of management in the process. Initially she said that she called management about her predicament but was told that it could give her no information, other than that she might wish to talk to the company’s lawyer. Later, however, she said that management told her about the Dixie and Dundas episode and the fact that employees had written a letter to the Board. She said she uncovered this information when she was “trying to get out of the union”. Ms. Paddon also testified that she thought the employees would “hear back from [Mr. Paris] again” with more information, even after the cards were signed. The implication here was that this gave Ms. Paddon some comfort with respect to her decision to sign a card at the meeting, knowing that she might later have a chance to retract it. When she was later asked why she signed the card when she did, however, Ms. Paddon said “I didn’t know when I was going to sign, if not then. What was I going to do, call him?”

45. Overall, the manner in which Ms. Paddon delivered her evidence suggested to me a much greater commitment to the wishes expressed in the employees’ August 8 letter than to an accurate recollection of the facts.

46. The most unusual twist in the evidence, however, came through the testimony of the employer’s final witness, Christine Kimberley. Ms. Kimberley is 21 years old and works as a sales clerk. Ms. Kimberley said that shortly after joining the meeting and sitting beside Laura Paddon, Ms. Kimberley asked Mr. Paris the following question “Can I pull out of the union at anytime?”. Ms. Kimberley said she asked this question because she was “concerned” and “didn’t know exactly what she was getting into”. According to Ms. Kimberley, Ms. Paddon heard her question and sim-

ply repeated it as follows: "Yeah, can we pull out at anytime?". According to Ms. Kimberley, Mr. Paris gave only the following curt answer to both questions: "Yes". She was definitive that there was no amplification on this answer. Needless to say, there was no mention of Ms. Kimberley's question in the evidence of either Ms. Lambrakis or Ms. Paddon.

47. As the ultimate co-author of the August 8 letter (along with her mother and another employee), Ms. Kimberley was asked during cross-examination whether she made any notes of the meeting at which its proposed contents were discussed. At first, she said that she kept notes, but only of her thoughts and not of what was said, suggesting both a lack of relevance to any issue in the proceedings and displaying some reluctance to provide the notes. At the request of the union, and over the objection of the employer, however, I directed the employer to produce the notes. The hearing then adjourned to allow Ms. Kimberley to return home to retrieve them.

48. Upon Ms. Kimberley's return, and over the objection of the union, I permitted the employer to introduce the notes. This is how they appear:

- don't seem beneficial. Ex 3.
- there were hidden regulations that I wasn't aware of.
- the representative said ~~that~~ I could pull out anytime
- I feel more obligated to the company I work for (too many mistakes)
- misleading information ~~was~~ being given
- have enough stress, don't need this union to complicate things more due to
- feel like the representative was not qualified to sign me to this union. No explanations were given to what would happen
- went into it blindly

~~Thursday~~
FRIDAY
11:00

49. It was the position of counsel for the employer that the third point in the notes lent support to Ms. Kimberley's evidence. I do not agree. The notes were not made contemporaneously with the events they purport to recount, but at a time when the employees were engaged in an effort to withdraw their support for the union. Further, the emphatic obliteration of the word pre-

ceding the personal pronoun (which appears even greater on the original document) which is well in excess of the effort employed to cross out the word "was" which appears two lines later, together with Ms. Kimberley's approach to the notes and her overall demeanour, caused me to seriously question their integrity.

50. In giving her evidence, Ms. Kimberley was, by turns, taciturn, unresponsive and combative. She often spoke with downcast eyes and, during cross-examination, revealed a consistent inability, or unwillingness, to recall events. She could not, for example, remember whether Mr. Paris spoke of the failed union organizing drive at Dixie and Dundas, whether he advised employees to be absolutely sure that they wished to sign a union card, or whether he said he would be sending in the application the next day. When asked a series of questions about the union membership cards, she gave the following typical replies: "I may have read it, but I didn't understand it. It's so long ago that I can't remember. If that's what it says, that's what it says". In short, I did not find Ms. Kimberley to be a credible witness.

51. In opposition to the employer's evidence, the union called Brando Paris. Mr. Paris has been a full-time organizer for the Steelworkers for ten years. Before that he was a volunteer organizer for another ten. Mr. Paris testified that in his capacity as senior organizer, he provides training to other organizers and attends periodic seminars at which legal counsel provide instruction on the law relating to organizing. According to Mr. Paris, organizers learn what they can and cannot say, in an effort to convince people "in the right way to join the union".

52. In weighing the evidence of Mr. Paris against that of the employer's witnesses, I was conscious of the fact, conceded by Mr. Paris during cross-examination, that he had a "considerable amount" riding on the Board's findings. It is important to Mr. Paris as a senior organizer and as one who comes before the Board not infrequently that he not only be credible but be seen to be credible, and that he uphold the high standards of integrity demanded by the Board. I also considered the fact that Mr. Paris, unlike the employer's witnesses, was to a large extent "on his home turf" and should be much more comfortable in giving evidence under oath. Even allowing for these factors, however, I preferred the evidence of Mr. Paris to that of the employer's witnesses.

53. Mr. Paris testified that he became specifically aware of Laura Paddon's identity at the meeting as a result of a remark statement she made in front of the entire table. Although that remark need not be recounted here, suffice it to say that it is one that might well stick in a listener's mind. Mr. Paris recalled that Ms. Paddon sat directly across from him at the table eating chicken fingers and chips, and that she was the last to sign a card. Mr. Paris also recognized Christine Kimberley, whom he saw outside the hearing room while waiting to testify, but he could not recall Ms. Lambrakis.

54. In addition to the events described in paragraphs 31 to 33 of this decision, and cautioning employees on several occasions to be absolutely sure of their decisions, Mr. Paris recalled explaining the procedure that would be followed if he was able to secure at the meeting the signatures of 55 per cent of the employees in the bargaining unit. He said that he would submit the application the next day and that in four or five days the green sheets would be posted. He explained the significance of the different dates that would appear in the green sheets (terminal, meeting and hearing) and said that a hearing would only be held if something went wrong.

55. Mr. Paris was emphatic that neither Ms. Paddon nor anyone else ever asked whether they could get out of the union after signing a card. He testified that had he been asked such a question, he would have said "I don't give cards back".

56. Mr. Paris also recalled receiving a telephone call from an employee approximately one

week after the meeting. Mr. Paris said that the employee did not identify herself but indicated that the employees had revisited the issue and no longer wished to be members of the union. He said that he reminded the employee that he had told them several times at the meeting not to sign a card “unless you are 100 per cent sure”, and that they could not now back out. According to Mr. Paris, the caller acknowledged having received this information, but wanted out of the union anyway. Mr. Paris said the caller also referred to the green sheets and the possibility of writing a letter to the Board. She asked whether each employee had to write a separate letter, or whether one would be sufficient. Mr. Paris said that this was up to them and that they could do what they wanted, but he would not return the cards. That was the end of the conversation.

57. In cross-examination, Mr. Paris’ testimony was unshaken.

58. On the basis of the foregoing, and as indicated earlier, I was unable to conclude that Mr. Paris had represented to employees that they could get out of the union after signing applications for membership.

59. No clear version of events emerged from the evidence of the employer’s witnesses and, in my view, the differences were more than might be expected when “stories aren’t cooked”, to borrow a phrase from employer counsel. Substantial differences existed in the nature of the question asked, the circumstances in which it was put, and the answer given, both within and as between the evidence of the three employer witnesses. Further, and as I have already indicated, the testimony of at least two of the employer’s witnesses suffered from serious problems of credibility. It should be noted, however, that at least in the case of Ms. Paddon, these problems did not appear to be the product of any conscious attempt to mislead the Board.

60. It was clear on the evidence that Mr. Paris cautioned employees not to sign cards if they might be inclined to change their minds in two or three days. I also find as a fact that Mr. Paris advised employees that the application might be submitted the next day, and that they could then be certified solely on the basis of the membership evidence. In these circumstances, it seems to me that the message that was being sent, and which must have been received by employees, was not that they could change their minds at some later date and reverse the process, but that it might well be too late to do so. It seems improbable in the circumstances that Mr. Paris, after telling employees to be absolutely sure about their decision to join a union and not to sign if they might be subject to a change of heart in two or three days, would then say, in effect, “but you can change your mind in a week or two, a month or two, or in six months or a year”. Indeed, the significance for purposes of certification of the employees’ decisions to sign cards, and the true meaning in Mr. Paris’ words, does not seem to have been lost on Ms. Paddon when she referred to the more lengthy time frames for her possible withdrawal from the union. In my view, this lends support to the applicant’s argument that employees understood from the meeting that once the cards were signed, the outcome could well be certification regardless of any subsequent change of heart.

61. Accordingly, and for all these reasons, I rejected the employer’s allegations of misconduct in the applicant’s organizing campaign and certified the applicant on the basis of the documentary evidence of membership filed with the Board.

3226-94-U Communications, Energy and Paperworkers Union of Canada and its Local 1291, Applicant v. Buntin-Reid Division of **Domtar Inc.**; Fred McNaught, Steven Kendall, Kevin Woodison, Larry Kitts and Ian Smith, Responding Parties

Practice and Procedure - Unfair Labour Practice - Union seeking leave to withdraw unfair labour practice complaint - Employer asking that withdrawal be on "with prejudice" basis - Board explaining that it is not its practice to require parties seeking to withdraw a complaint to do so on "with prejudice" basis - Questions related to abuse of Board's processes can be raised in subsequent application, if any - Board granting applicant leave to withdraw application

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *Orval G. McGuire* and *D. A. Patterson*.

DECISION OF THE BOARD; March 28, 1995

1. This is an application pursuant to the provisions of section 91 of the *Labour Relations Act*.
2. In correspondence directed to the Registrar dated March 24, 1995, counsel for the applicant has sought leave to withdraw this application. However, in correspondence dated March 27, 1995, counsel for the responding party employer seeks that any such withdrawal be on a "with prejudice" basis in light of the expenses already incurred by his client and in light of what he describes as the unfairness that might be involved in permitting the applicant to "resurrect" these matters in a subsequent application.
3. In the interests of facilitating the settlement process, it is not the Board's practice to require parties seeking to withdraw a complaint to do so on a "with prejudice" basis. Any questions related to an abuse of the Board's processes may be raised in the event that the applicant seeks to pursue these matters in a subsequent application.
4. Accordingly, the Board grants the applicant leave to withdraw the present application.

0999-94-U **Harold Goldson**, Applicant v. CAW Canada, Local 112, Responding Party v. de Havilland Inc., Intervenor

Duty of Fair Representation - Unfair Labour Practice - Applicant alleging that union failed to represent him adequately in various dealings with employer - Board finding no substance in union's complaints - Application dismissed

BEFORE: *Christopher Albertyn*, Vice-Chair.

APPEARANCES: *Harold Goldson* on his own behalf; *Merv Gray*, *Fred McLean* and *John Kennedy* for the responding party; *Hugh Dyer* and *Sonia Ventresca* for the intervenor.

DECISION OF THE BOARD: March 21, 1995

1. This is an application in terms of Section 91 of the *Labour Relations Act*. The applicant alleges that the responding party has violated section 69 of the Act by acting in a manner that is arbitrary, discriminatory or in bad faith in its representation of him.

2. The applicant has a strongly felt sense of grievance against the responding party ("the Union"). He is frustrated by what he believes to be years of neglect of him by the Union. He has worked for the Company for 23 years and he feels that his years of contribution to the Union have brought him no satisfaction.

3. The applicant concedes that the Union has never refused to file a grievance for him and he has filed many grievances over the years.

4. On December 7, 1993 the applicant concluded an agreement with the intervenor ("the Company") in terms of which the applicant agreed, in return for consideration paid to him by the Company, that:

this settlement is in full, final and complete settlement of all claims existing up to the date hereof, arising out of or in any way relating to his employment with [the Company].

5. In terms of that settlement reached between the applicant and the Company, the applicant waived any claims he might have had as regards unresolved grievances arising out of his employment up to December 7, 1993.

6. At the commencement of the proceedings the applicant explained that he had four complaints against the Union. They are:

1. the Union failed adequately to represent him as regards an incident which occurred on December 6, 1993, immediately prior to the conclusion of the settlement agreement referred to above;
2. the Union failed adequately to represent him in relation to a meeting of the production crew which occurred in July 1994;
3. the Union failed adequately to represent him in relation to a meeting between the applicant and his superior, Mr. Mayher, which occurred soon after the production crew meeting in July 1994;
4. the Union failed to secure a written apology from his supervisor, Mr. Downey, in settlement of a grievance of the applicant.

7. I will address the evidence and argument in respect of each of these complaints in turn.

The first complaint

8. The first complaint arises from an incident on December 6, 1993. At the start of the applicant's shift on that day he found an anonymous abusive note in his desk drawer, reading, in bold letters, "nigger monkey man go back to the jungle". The applicant was understandably extremely offended. He reported the matter to the Company's Employment Equity Co-Ordinator.

9. Management inquired of the applicant what action he wanted taken. The applicant requested that the police be summoned to investigate. This was done. He was displeased by the investigation because he himself was interviewed only briefly by a police officer and he was asked a question which he considered irrelevant to the police inquiry.

10. The Company's Chief of Security interviewed all of the employees who worked in the vicinity of the applicant on his shift, and those who had worked in that vicinity on the previous shifts to try to detect the perpetrator.

11. Management convened a meeting of all of the employees who worked in the vicinity of the applicant, both on his shift and on the previous shifts, and informed them that the racist and harassing conduct of the person(s) who had placed the offending note in the applicant's drawer would not be tolerated, and that if the perpetrator(s) was apprehended s/he or they would be severely disciplined.

12. The Union's Committee representative of the applicant was away from the plant at the time of the incident. When he returned he immediately convened a meeting between the applicant, the Union Local's President and its Chair, to consider what action the Union should undertake to support the applicant. The Union's senior office-bearers explained to the applicant that the Union would not tolerate the offending conduct and that the Union would reiterate its policy on workplace harassment. The Union office-bearers clarified that the Union's national policy on workplace harassment would be strictly adhered to.

13. For some years prior to the incident, the Union had a workplace harassment policy in all of its union shops. A copy of that policy was submitted in evidence. It takes a firm stand against all forms of workplace harassment, including racial harassment.

14. For some time prior to the offending incident, the Union and the Company had jointly undertaken a process of training of the Company's employees to make them aware that workplace harassment will not be tolerated.

15. The applicant's Union Committee representative sought, and obtained, permission from management to shut down the shop and to convene a meeting of all employees working on the floor with the applicant. That meeting was addressed by the Union Local's Chair, Mr. Gray. He made clear in the meeting that the Union would not tolerate workplace harassment and that it would not assist any employee engaged in any activity which violated the Union's anti-harassment policy. In his words, any Union member guilty of workplace harassment, was "on his own".

16. The Union convened a second meeting of all of the employees in the upstairs shop too, for the same purpose.

17. At the conclusion of the general meetings, the applicant's Union Committee representative, Mr. McLean, took the applicant aside and inquired of him if there was anything more he wanted the Union to do. The applicant stated that there was not much more that the Union could do, given that the perpetrator(s) of the offending act had not been found. Mr. McLean gained the impression from the applicant that he was satisfied with the Union's efforts to support him.

18. The applicant was unable to state what more the Union should have done on his behalf in respect of this incident. He feels a general sense of grievance against the Union, but he cannot specify what more the Union could have done in this instance. At the time the applicant did nothing to suggest any dissatisfaction with the manner in which either management or the Union handled his problem. No grievance was filed by the applicant.

19. The Union's and the Company's representatives argued that the Union had responded more than adequately when its office-bearers were informed of what had happened. The Union is taking general preventive action to limit the occurrence of workplace harassment by publishing its

policy with the plant and by undertaking jointly with management the training of employees in what conduct is acceptable at work, and what is not.

20. In addition, as soon as the Union became aware of what had occurred it convened a meeting of the full work crew and its Chair addressed them, informing them that the Union would not tolerate such behaviour, and it would not defend any employee guilty of racist or harassing behaviour.

The Second Incident

21. In July 1994 management convened a meeting of the production crew from the area where the applicant works. The applicant is not part of the production crew. His job is to inspect the work of production employees. The inspectors were not invited to the meeting.

22. At the production crew meeting, management inquired if the employees had any concerns. Some expressed concerns that the applicant was inconsistent in the manner in which he conducted his inspections. Some felt that he was more demanding of some production crew members than of others. The Union's alternative committee representative, Mr. Ferguson, happened to be present in the meeting, as an observer.

23. The applicant complains that Mr. Ferguson had not come to him after the meeting to inform him that certain employees had raised certain concerns about him. That is the extent of this complaint.

24. The Union argued that there was no obligation whatsoever upon Mr. Ferguson to report to the applicant of what had been said at a production crew meeting about him. Mr. Ferguson was at the meeting as an observer. He had no particular interest in the meeting. It was a management meeting, convened in terms of the management's rights article of the collective agreement. Mr. Ferguson had no control over that meeting, nor any authority to intervene in any manner in relation to that meeting.

25. The Company made similar submissions. It argued that the meeting had nothing to do with the Union. It was a management-convened meeting to hear the concerns of the production crew, many of whom were upset by what they believed to be favouritism on the part of the applicant in the conduct of his inspections.

The third incident

26. Soon after the meeting with the production crew, Mr. Mayher, the applicant's manager, convened a meeting of the applicant, Mr. Ferguson in his capacity as the applicant's representative, and Mr. Roll, the applicant's immediate supervisor.

27. Mr. Ferguson had no notice of the purpose of the meeting before being required to attend. Its purpose was for Mr. Mayher to inform the applicant of the concerns of some of the production crew, and to counsel him to apply any even standard to all production employees equally. The meeting had no disciplinary purpose. The applicant was not disciplined. Mr. Mayher informed him of the concerns of certain members of the production crew that the applicant was showing preference to some of them in the manner in which he conducted his inspections. The applicant inquired if Mr. Mayher was suggesting that he was not doing his job properly. Mr. Mayher made clear that that was not what he was saying. There was no question about the applicant's ability to do his work. Thereupon the applicant left the meeting. No further consequences flowed from the meeting.

28. The applicant contended that he was harassed by Mr. Mayher in the meeting. Mr. Ferguson did not agree with that observation. He did not feel that the applicant was harassed in the meeting.

29. The applicant made no request to Mr. Ferguson that he file a grievance on the applicant's behalf. There was no complaint made by the applicant to Mr. Ferguson concerning the meeting.

30. At the hearing of this application the applicant complained that Mr. Ferguson ought to have notified him of the purpose of the meeting in advance of it, he ought to have spoken up for him at the meeting with Mr. Mayher, or he should later have filed a grievance on his behalf.

31. The Union argued that Mr. Ferguson acted entirely properly in the manner in which he dealt with the situation. He observed what occurred at the meeting. The purpose of the meeting was to counsel the applicant of complaints received by production employees. The meeting was convened by management with that purpose in mind. Mr. Ferguson was not called up by the applicant to make any representations, and nor were any representations appropriate. No discipline was taken against the applicant and he suffered no prejudice whatever as a consequence of the meeting.

32. The Union argued that there was no obligation on Mr. Ferguson himself to file a grievance in the absence of a request from the applicant.

33. The Company made similar submissions.

The fourth incident

34. Mr. Downey, then the applicant's supervisor, tore up a written submission made to him by the applicant. He acted wrongly in doing so. The Union filed a grievance on the applicant's behalf.

35. At the second stage meeting concerning the grievance, Mr. Downey apologized for having done what he did. The applicant said that he would accept the apology if it was in writing.

36. On two occasions the applicant's Union representative, Mr. McLean, went to Mr. Downey to secure the written apology and eventually Mr. McLean managed to have the grievance form altered so as to record Mr. Downey's apology in writing.

37. A written record of Mr. Downey's apology was presented in evidence at the hearing.

38. The evidence of Mr. McLean for the Union is that he showed the written record of Mr. Downey's apology to the applicant. The applicant denied ever having seen the written apology, although his recollection of the matter was not good.

39. The Union's submission is that the applicant's grievance was properly pursued and successfully resolved in the manner sought by the applicant.

Conclusions

40. I find that there is nothing in the evidence to suggest any breach whatsoever of the Union's duty fairly to represent the applicant. On the contrary, the evidence suggests that the Union acted at all times with due diligence in relation to the applicant. Far from there being any

breach of section 69 of the Act, the evidence suggests that there is no reasonable cause for complaint by the applicant.

41. As regards the first incident, nasty and hurtful though it must have been to the applicant, the Union did all it could to re-assert the principles of equality and fair treatment it had sought to promote among its members. It took the unusual step of stopping production and having its Chair address the whole work crew to explain to them that racial harassment was completely unacceptable behaviour which the Union would not tolerate.

42. As regards the second incident, the management meeting of July 1994, the Union had no role to play. The meeting was called by management to listen to complaints expressed by employees against the applicant in respect of the manner in which he inspected their work. The Union representative attended that meeting to observe what was happening, but he had no obligation to convey to the applicant what had transpired at the meeting.

43. When the applicant learned of what had been said about him at the meeting, he was entitled to file a grievance should he have chosen to do so. The evidence revealed that the applicant was familiar with the operation of the grievance procedure and that he had filed many grievances in the past. He chose not to file a grievance in this instance. There was no action which the Union ought to have taken in the absence of a grievance by the applicant.

44. Hence I find nothing improper in the Union's conduct in respect of the second complaint.

45. Mr. Ferguson had no prior knowledge of the purpose of the meeting in Mr. Mayher's office. He could not therefore have informed the applicant of its purpose prior to the meeting.

46. The meeting in Mr. Mayher's office was for the purpose of coaching or counseling the applicant. He was not disciplined in that meeting. There was nothing which Mr. Ferguson should reasonably have said, given what transpired in the meeting. The applicant inquired if his work was being criticized and Mr. Mayher told him that that was not so. That concluded the meeting. The applicant did not pursue any aspect of that meeting. He did not discuss the matter with Mr. Ferguson. He never complained to Mr. Ferguson about his failure to speak at the meeting. He never filed a grievance against the Company arising from the meeting to enable the Union to address any concerns the applicant might have had concerning the meeting. The applicant made no follow up at all. In the circumstances it was reasonable for Mr. Ferguson to conclude that nothing further was expected of him in relation to that meeting.

47. The applicant contended that Mr. Ferguson should himself have filed a grievance for the applicant arising from what occurred at the meeting in Mr. Mayher's office. That was not a reasonable expectation of Mr. Ferguson. It would have been risky, and perhaps foolhardy, for Mr. Ferguson to have filed a grievance for the applicant without his prompting and his support. Mr. Ferguson acted correctly in taking no further action.

48. The fourth incident was resolved to the applicant's satisfaction. He was issued a written apology by Mr. Downey. That apology was written as a direct consequence of the persistence of Mr. McLean, the applicant's Union representative. The only dispute is whether that apology was then shown to the applicant by Mr. McLean. To the extent that the credibility of the witnesses is at issue to decide the matter, the applicant was not a good witness. He was evasive and vague. His recollection of events readily shifted during the course of his testimony. Mr. McLean's evidence was that he showed the grievance form to the applicant. The form records the resolution of the grievances as follows, "The supervisor has apologized to the grievor and regrets the incident hap-

pening''. Mr. McLean explained to the applicant at the time that the wording was such that a written apology had been provided to the applicant.

49. In the circumstances I find nothing remiss in the Union's conduct in respect of the fourth incident. The applicant's grievance was pursued by the Union and the Union secured the settlement sought by the applicant.

50. In light of the above considerations I find that there is no substance in the applicant's complaints. The application is accordingly hereby dismissed.

1596-94-R; 2789-94-U Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 30, Applicant v. #1022472 Ontario Inc., c.o.b. as **Heritage Mechanical**, #821120 Ontario Inc., c.o.b. as Mette Plumbing, #821120 Ontario Inc., c.o.b. as Heritage M & E, DFC Mechanical Contractors Ltd., Responding Parties; Ontario Sheet Metal Workers' Conference, Sheet Metal Workers' International Association, Local 30, Applicant v. 821120 Ontario Inc. c.o.b. as Heritage M & E and/or Mette Plumbing, Responding Party

Certification - Construction Industry - Discharge - Discharge for Union Activity - Evidence - Membership Evidence - Interference in Trade Unions - Unfair Labour Practice - Board dismissing allegation that employer flooded target bargaining unit with new employees solely for purpose of defeating certification application - Board applying *Trades Qualification Act* and finding two contested individuals to be registered sheet metal workers for purposes of certification application - Board not considering unsigned membership evidence submitted on behalf of single employee - Board directing representation vote - Board finding no connection between certification application and employee's lay-off - Unfair labour practice complaint dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *J. Raso*, *Jim Love* and *Scott MacDougall* for the applicant; *David M. Chondon* and *Larry Hasler* for the responding parties.

DECISION OF THE BOARD; March 21, 1995

1. These applications were heard together.
2. Board File No. 1596-94-R is an application for certification in the construction industry. As such, it is an application for certification within the meaning of section 121 of the *Labour Relations Act*.
3. The applicant Sheet Metal Workers International Association, Local 30 is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is also an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 141 of the Act on April 28, 1986, that designated employee bargaining agency is the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference.

4. Although styled in this application as the "Ontario Sheet Metal Workers' & Roofers' Conference", it appears that the proper name of the other applicant is the "Ontario Sheet Metal Workers' Conference", and the name of that applicant is hereby so amended.

5. The Ontario Sheet Metal Workers' Conference consists of eleven locals of the Sheet Metal Workers' International Association, including Local 30. All of these Locals are trade unions within the meaning of section 1(1) of the Act, and all are constituent trade unions which are vested the appropriate authority in the Ontario Sheet Metal Workers' Conference to enable it to discharge the responsibilities of bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*. Further, the Ontario Sheet Metal Workers' Conference is also an affiliated bargaining agent of the designated employee bargaining agency named in paragraph 3, above.

6. The Sheet Metal Workers' International Association, Local 30 is therefore a superfluous applicant, since any bargaining rights obtained by the Conference will flow through to Local 30 (as well as to all the Conference's other constituent trade unions) by operation of law. Accordingly, the Board will treat the Conference as the applicant for certification.

7. Because the application for certification relates to the industrial, commercial and institutional sector of the construction industry referred to in section 119 of the Act, and is made by an affiliated bargaining agent of a designated employee bargaining agency, the application is made under section 146(1) of the Act.

8. By letter of agreement dated November 16, 1994, with respect to Board File No. 1596-94-R, the parties have agreed as follows:

"1. The Applicant agrees to amend its application to remove DFC Mechanical Contractors Ltd. as a Responding Party in this matter, without prejudice to the Applicant's right to name them in any future s. 1(4) applications before the Board.

2. The Responding Party agrees that 821120 Ontario Inc. is a successor employer of 1022472 Ontario Inc. pursuant to s.64 of the LRA and the Applicant agrees to amend its application to remove 1022472 Ontario Inc., c.o.b. as Heritage Mechanical as a Responding Party in this matter.

3. The Parties agree that the following constitutes a unit of employees of the Responding Party appropriate for collective bargaining:

all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage Mechanical and/or Mette Plumbing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage Mechanical and/or Mette Plumbing in all other sectors in Board Area #8, save and except non-working foremen and persons above the rank of non-working foreman.

4. Attached is a copy of the list for the purposes of the count. The Applicant challenges the following individuals as not being registered apprentices and therefore not employees in the bargaining unit on the date of application:

Martin Drake
Scott Goodlet

The parties agree that the issue of whether they are registered apprentices is one that should be dealt with at a hearing by the Board.

5. In light of the above the parties agree that an examination and formal Officer's report is not required in this matter."

Having regard to this Letter of Agreement, as clarified by counsel at the hearing:

- (a) the application for certification herein as against DFC Mechanical Contractors Ltd. is withdrawn with leave of the Board;
- (b) the application for certification as against 1022472 Ontario Inc., c.o.b. as Heritage Mechanical is withdrawn with leave of the Board;
- (c) the Board finds that all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of 821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees appropriate for collective bargaining.

9. Board File No. 2789-94-U is an application under section 91 of the Act in which the applicants allege that the responding employer 821120 Ontario Inc. c.o.b. as Heritage M & E and/or Mette Plumbing (and that application is so amended) has acted in a manner contrary to section 65, 67 and 71 of the *Labour Relations Act*, with a view to defeating the application for certification in Board File No. 1596-94-R.

10. The parties filed an "Agreed Statements of Facts" dated December 15, 1994 in Board File Nos. 1596-94-R and 2789-94-U, filed as Exhibit 1 in these proceedings. This Agreement is styled as being between Sheet Metal Workers' International Association, Local 30 and 821120 Ontario Inc. c.o.b. Heritage M & E and/or Mette Plumbing, and indicates that they have agreed that:

"Agreed Statements of Facts between SMWIA, Local 30 and 821120 Ontario Inc. c.o.b. Heritage M & E and/or Mette Plumbing.

The Parties Agree as Follows:

- 1. The Respondent Employer became aware of the Union's drive to certify the company sometime in the last week of July, 1994.
- 2. On August 2, 1994 the Employer released to the employees a Statement concerning a potential Application, attached as Schedule A.
- 3. As a result of a previous organising drive by the IBEW, the Employer had some knowledge as to the rules and procedures concerning which employees would be included in the list of all persons employed in the bargaining unit described in an Application.

4. Specifically, the Employer was aware that the list would contain only:

“journeymen sheet metal workers and registered apprentices employees on the day of the application”.
5. For the purpose of including them on the employee list for a potential application, the Employer did the following:
 - a) On August 4, 1994, “arranged” (subject to the *viva voce* evidence) for Mr. Scott Goodlet and Mr. Martin Drake to sign a Contract of Apprenticeship for the sheet metal trade. There were three other helpers/assistants doing sheet metal work at the time;
 - b) requested that Robert Tarrington return from his vacation earlier than planned to perform bargaining unit work (b.u. work) on August 3, 1994 and August 4, 1994 for a total of 3 hrs. on August 3/94 & August 4/94;
 - c) requested that Percy Hoskins come in after his blacksmith course to perform b.u. work on August 4, 1994 - 4 hours total.
6. The Application for Certification was filed on August 4, 1994.
7. To have the 2 persons registered, the Employer contacted the Ontario Training & Adjustment Board during the last week of July, 1994. It requested that Mr. Drake and Mr. Goodlet be registered as sheet metal apprentices. The Employer called again on August 2, 1994 & stated that it was important that it be done as soon as possible.
8. On August 4, 1994 Ms. Shariffa Kasson attended at the employer’s premises.
9. Article 6 of Regulation 1077 to the *Trades Qualification and Apprenticeship Act*, of Sheet Metal requires the following Ratio:
 - one apprentice for the 1st journeyman
 - plus one additional apprentice for each additional 4 journeymen.
10. On the date of the signing of the Contracts, the Employer had 8 journeymen and one apprentice (not counting Mr. Drake and Mr. Goodlet).
11. Mr. Drake voluntarily entered into the Contract of Apprenticeship. There is no evidence that Mr. Tarrington nor Mr. Hoskins were forced or coerced into returning early to work.
12. On August 4, 1994 Mr. David Saltern was a member in good standing of the Union. He has voluntarily continued to maintain his membership in the Union and is presently a member in good standing of the Union.

Schedule “A”

As you are probably aware, the International Brotherhood of Sheet Metal Workers is trying to get some of you to sign union cards.

You have the right to join a union if you wish, and the right to refuse to join.

We do not wish to interfere with your decision. However, Heritage M & E asks you to think about the following since this may be one of the most important decisions you will ever have to make:

Unionization is not something you just “try” - getting into a union is easy but getting out is very tough.

If you sign a union card, it means you want a union. If the union can get more than 55% of our employees to sign cards, then the union can get in *without any vote being held*.

Often union organizers will claim that "everybody else has signed up", even when they are just getting started. You should talk to your fellow employees to see if this is true, don't be stampeded.

Why is the union interested in you - is it because there is a need for a union or is it because of the revenue they would receive from union dues?

How much are the union dues and what will you get in return for these dues?

What has the union done for others in the industry?

How well do you know the union leaders, including the union representatives in the workplace, and what voice will you have in running the union's affairs?

Do I need outsiders to represent me in my working relationship with Heritage M & E.

It is common for unions to make many promises, like a politician trying to get elected. However, the law prohibits the Company from making any promises to you. This is a campaign where only one candidate can make promises. We can only ask you to consider the record of the management group at Heritage M & E. We have successfully survived the years in a very difficult economy and have attempted to minimize any negative impact on our employees.

It is also common for a union organizer to make promises of greater job security. No union can prevent lay-offs, no union gives jobs. Your job security comes from providing good service to our clients, ensuring quality workmanship and being able to do so at a competitive price in a very competitive market. You too have a key role to play as a partner in this and help to create your own job security. In another case, the Ontario Labour Relations Board has said,

"... No union can guarantee any employee indefinite job security."

Ask the union organizers about the union hiring hall and the number of sheet metal workers on the hiring hall list who are looking for work. Also ask the union about the hiring hall provisions in the provincial collective agreement which only would give the Company the right to name-hire a foreman.

Your decision to sign or not sign a union card is your choice. We feel we have been a fair employer over the years and that our current relationship is worth preserving. Please consider the above carefully before making up your mind.

As always, your decision will be respected by us."

11. In the certification proceeding, the responding employer 821120 Ontario Inc., c.o.b. as Heritage M & E and/or Mette Plumbing filed a Schedule "A" List of Employees containing 11 names:

Bell, Christopher
Bull, Brad
Caine, Brian
Drake, Martin
Ellis, Rodney
Goodlet, Scott
Hoskins, Percy
Ratz, Carl
Saltern, David
Tarrington, Robert
Taylor, Gary

12. The Conference asserts that 4 of the persons named by the responding employer should not be on the list of employees as follows:

- (a) Martin Drake and Scott Goodlet because they were not properly registered as apprentice sheet metal workers on the certification application date;
- (b) Robert Tarrington because he was summoned and forced to return to work from his vacation as part of the responding employer's effort to defeat the application for certification;
- (c) Percy Hoskins because after having been a sub-contractor he was made an employee as part of the responding employer's attempt to defeat the application for certification.

13. From past experience, the responding employer had some knowledge of what an application for certification involves. Accordingly, when the company learned of the Sheet Metal Workers' organizing campaign in late July, 1994, it retained counsel. The responding employer wanted to ensure that any decision its employees made regarding trade union representation was an informed one. The result was the letter set out in paragraph 10, above, which was vetted by counsel.

14. It was not disputed that Christopher Bell, Brad Bull, Brian Caine, Carl Ratz, David Saltern, Robert Tarrington and Gary Taylor were all journeymen sheet metal workers who were at work for the responding employer on August 4, 1994, the certification application date herein, and are therefore properly included on the list of employees for purposes of the application. Nor was it disputed that Rodney Ellis is properly included on the list of employees as a registered apprentice sheet metal workers.

15. Larry Hasler is the owner and sole shareholder of the responding employer. He started the company in 1989 and began operating under the firm name and style of "Mette Plumbing", a pre-existing name of a plumbing contractor. Subsequently, in late February, 1994, the responding employer "took over the operations of 1022472 Ontario Inc.", a sheet metal and electrical contractor, and registered "Heritage M & E" as an additional operating name. Upon taking over the operations of 1022472 Ontario Inc., Hasler evaluated the "helpers" then in the responding employer's workforce for the purpose of assessing them as prospective tradesmen. Hasler was not satisfied with what he found. Accordingly, he looked outside of the company.

16. As a result, Scott Goodlet was hired on June 6, 1994 and Martin Drake was hired on June 28, 1994. Although the evidence is somewhat ambiguous, the Board is satisfied that both

Goodlet and Drake were hired as “helpers” for a trial period of up to, but possibly less than three months, during which period their work and value to the responding employer was to be assessed. When they were hired, Goodlet and Drake were told that if the company was satisfied with their performance during the trial period they would be engaged as apprentices in one of the construction trades as required by the company. There was no further discussion about apprenticeship between Goodlet or Drake and any member of the company’s management until August 4, 1994.

17. Both Goodlet and Drake ended up spending most or all of their time doing sheet metal work. Drake was quite happy to do so. Goodlet’s interests lay elsewhere, specifically in the heating, ventilation and air-conditioning area, but it appears that he voiced no objection or concern to anyone in management in that respect.

18. The responding employer became aware of the applicant’s organizing campaign sometime during the last week of July, 1994. The Board is satisfied that the responding employer decided that it wanted to engage both Goodlet and Drake as sheet metal worker apprentices prior to learning of the organizing campaign.

19. From past experience, the responding employer is familiar with certification procedures and practices under the *Labour Relations Act*. Consequently, when it learned of the applicant’s organizing campaign the company moved immediately to register Goodlet and Drake as apprentices so that they would be included in the bargaining unit for purposes of the anticipated application for certification. Assuming that an employer is prohibited from hiring employees into what it anticipates will be a bargaining unit with respect to which an application for certification will be made because it believes the new employees will be unsympathetic to such an application, the Board is satisfied that in this case the company honestly desired that all existing employees who would be affected by such an application have a say in it, and was not improperly motivated. There is no suggestion in the evidence that the responding employer inquired or was otherwise aware of how Goodlet or Drake felt about either the applicant or trade unions in general.

20. Gary Taylor, a journeyman sheet metal worker who was a working foreman in charge of the company’s Sir Sanford Fleming job site in Lindsay where Goodlet or Drake were both working, had indicated to both of them that the company would probably engage them as apprentices. These conversations were casual and prior to August 4, 1994 nothing specific was indicated to either Goodlet or Drake regarding exactly when this would happen or which trade the company wanted them to apprentice in. However, both Goodlet and Drake were left with the impression that something would happen soon and both assumed that their apprenticeships would be in the sheet metal trade because they had spent most of their time with the company doing sheet metal work.

21. During the last week of July, 1994, Hasler telephoned the Ontario Training and Adjustment Board, which is responsible for administering and enforcing the *Trades Qualification Act* and regulations thereunder. He spoke with Shariffa Kassam, who is a training consultant whose duties include registering apprentices and enforcing the journeyman to apprentice ratios stipulated under the *Trades Qualification Act*.

22. There are some differences between Hasler’s evidence and Kassam’s testimony regarding what was said during the telephone conversation, and what occurred and was said subsequently on August 4, 1994. However, we are satisfied that many of these differences are more apparent than real, and that the differences which do exist are relatively minor. Further, we are satisfied that both Hasler and Kassam testified in an honest and forthright manner. The differences in their testimony result from fading recollections of events which held different significance for them,

both at the time and when they testified, given their interests and perspectives insofar as these proceedings are concerned.

23. The Board is satisfied that Hasler telephoned OTAB to make arrangements to have Goodlet and Drake contracted to the company as apprentice sheet metal workers.

24. From Kassam's description of the way she normally handles things (which it appears was the basis of most of her evidence rather than her recollection of what occurred in this specific instance), the Board is satisfied that part of the telephone discussion she had with Hasler during the last week of July, 1994 concerned the issue of ratio and how many journeymen and apprentices were employed by the responding employer at the time. When she was satisfied that it was worth making the trip to the responding employer's shop in Bowmanville, Kassam agreed to meet Hasler, Goodlet and Drake at the company's shop around noon on Thursday, August 4, 1994. When she arrived at the shop, neither Goodlet nor Drake were there yet so she left to have lunch.

25. In the morning of August 4, 1994, Hasler telephoned Taylor at the Lindsay job site and instructed him to tell Goodlet and Drake to get their education documents and come to the responding employer's shop in Bowmanville to sign contracts for apprenticeship. This was the first specific indication to either Goodlet or Drake that the company wanted to engage them as apprentices. Although the trade was still not specified to them, Goodlet and Drake both assumed it would be as apprentice sheet metal workers.

26. Hasler, Goodlet, Drake and Kassam met at the company's shop at approximately 1:00 p.m. on August 4th. After some discussion during which Kassam explained to Goodlet and Drake how the apprenticeship program works, and satisfied herself that they met the requirements for becoming apprentices, and that the responding employer was in ratio, she approved contracts of apprenticeship in the sheet metal trade for both of them. Although the contracts were signed on August 4, 1994, they were both back-dated to August 2, 1994. Kassam testified that it is not common to date a contract of apprenticeship other than when it is actually signed, but that it does happen occasionally.

27. As far as Kassam was aware, the responding employer had no other sheet metal worker apprentices at the time. Regulation 1077 under the *Trades Qualification Act* stipulates that where the "employer" is not a journeyman in the trade, which Hasler, the "employer" for these purposes, is not, "the number of apprentices who may be employed by an employer in the certified trade shall not exceed . . . one apprentice for the first journeyman . . . plus an additional apprentice for each additional four journeymen . . .". For Kassam's purposes on August 4th the responding employer had to have a minimum of five journeymen sheet metal workers in its employ. When she asked, she was told "at least six", which satisfied her concerns in that respect.

28. In fact, on August 4, 1994 the responding employer already had one apprentice sheet metal worker and eight journeymen sheet metal workers on its payroll. The week before it had nine journeymen, but one had quit. By the week after, the departed journeymen had been replaced. Consequently, on August 4, 1994, the responding employer did not in fact have nine journeymen sheet metal workers, which was the minimum number required for it to be entitled to engage both Goodlet and Drake as apprentice sheet metal workers, although it had the requisite minimum number immediately before and immediately after. The Board is satisfied that Hasler did not deliberately attempt to mislead or misinform Kassam, but rather that he did so as a result of some confusion on his part, and an honest though mistaken belief that the responding employer would be "in ratio" with Goodlet and Drake as apprentices.

29. The responding employer did not dispute that it wanted to have Goodlet and Drake

included on the list of employees for the application for certification it expected the applicant to make, and that that was one reason why it wanted Goodlet and Drake registered as apprentice sheet metal workers. That was also why it called Robert Tarrington back to work from his vacation. The applicant argued that such a “stacking of the list (of employees)” is contrary to section 65 of the *Labour Relations Act* because it is improper for an employer to try to pick and choose who will be on the list of employees. Further, the applicant submitted that the registration of Goodlet and Drake as apprentices was contrary to the *Trades Qualification Act* because Goodlet’s registration was not voluntary, and because the responding employer was not “in ratio” when Goodlet and Drake signed their contracts of apprenticeship.

30. There is nothing in the *Labour Relations Act* which requires that an employer want to be unionized, or that an employer not oppose an application for certification, or even that an employer be neutral about it. On the contrary, an employer is entitled, as most employers are, to be opposed to an application for certification and to voice its objection to an application for certification or trade union organizing campaign, so long as the employer (or anyone acting on its behalf) does nothing to interfere with the rights of its employees under the *Labour Relations Act* to choose for themselves whether or not they will join a trade union or support an application for certification. An employer is prohibited from doing anything which interferes with a person’s rights under the *Labour Relations Act*, or from doing anything to a person because of the manner in which s/he has exercised his/her rights under the Act or has participated in a proceeding under the Act.

31. For purposes of the *Labour Relations Act*, whether or not an employer decides to employ, or refuses to employ or continue to employ a person is in the employer’s discretion, so long as it does not do so in order to interfere with rights under the *Labour Relations Act*, or because of the manner in which such rights may be, are being, or have been exercised. Merely hiring new employees or discharging existing employees after becoming aware of a trade union’s organizing campaign or an imminent application for certification does not constitute a breach of the *Labour Relations Act* unless it is improperly motivated; that is, unless it is motivated by a desire to defeat the rights of employees under the Act. In that respect, it may be contrary to the Act for an employer to flood a targeted bargaining unit with new employees solely for the purpose of defeating an application for certification.

32. However, the Board is not satisfied that this is what happened in this case (see paragraph 19, above). Here, the responding employer merely accelerated what it intended to do in the ordinary course of business out of a concern, not only that all persons who it expects will be affected by the application for certification have a say in it, but also out of the concern for its own ability to hire the employees it wanted. Although, the responding employer couched its position almost entirely in altruism, it made no bones about its opposition to the application and its own concerns. But there is nothing wrong with that.

33. Further, the employer did not hire Goodlet or Drake as new employees. It merely changed their status from “helpers” to “apprentice sheet metal workers”. The decision to do so was made before the employer became aware of the organizing campaign and expected an application for certification. The fact that the responding employer had Goodlet and Drake registered as apprentices sooner than it would have done otherwise in anticipation of this application for certification was not, in the circumstances of this case, improper.

34. The Board is also satisfied that both Goodlet and Drake are registered sheet metal workers for purposes of the application for certification. The Board has long applied the *Trades Qualification Act* (formerly *Apprenticeship and Tradesmen Qualification Act*) the bargaining unit issues in construction industry application for certification with respect to a compulsory certified

trade, which the sheet metal worker trade is. In applying what is now the *Trades Qualification Act* to a list of employees issue in *O.J. Pipelines Inc.*, [1989] OLRB Rep. Sept. 976, the Board explained that:

...

7. The designation orders issued pursuant to section 138(1) of the Act describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which "belong" to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco construction Ltd.*, *supra*; *Manacon construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act requires an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board's practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.

8. Pursuant to the designation order referred to in paragraph 1 above, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada, has been designated to represent in bargaining in the ICI sector of the construction industry "all Journey and Apprentice Plumbers and Pipefitters" represented by its affiliated bargaining agents.

9. Sections 1(a) and (b), 9 and 11 of the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, Chapter 24, provide that:

1. In this Act,

- (a) "apprentice" means a person who is at least sixteen years of age and who has entered into a contract under which he is to receive, from or through his employer, training and instruction in a trade;
- (b) "certified trade" means a trade designated as a certified trade under section 11;

...

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and

- (b) within three months after commencing to work in that trade, file with the Director his contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1)(b), cease to work in that trade until he files with the Director his contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

11.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following the month in which the trade is certified to qualify for a certificate of qualification in the trade, if he,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he is qualified to work in the trade and meets such other requirements as the Director may prescribe.

10. It is evident from the Board's decisions in cases like *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C T Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *Phase IV (4) Electrical Contractors Limited*, Board File No. 2792-87-R, unreported decisions dated March 25, 1988 and July 5, 1988), and *B. C. Meck*, [1988] OLRB Rep. June 546 that the focus of the Board's concern in applications for certification relating to bargaining units described in terms of compulsory certified trades is that persons working or employed in such trades be lawfully so engaged before they are considered to be employees for certification purposes. Consequently, the Board has applied the *Apprenticeship and Tradesmen's Qualification Act* in such cases in determining the list of employees in such bargaining units for certification purposes.

11. Pursuant to Regulations 52 and 59 (R.R.O. 1980) respectively under the *Apprenticeship and Tradesmen's Qualification Act*, the trades of "plumber" and "steamfitter" are compulsory certified trades. The Board has determined that the labels "pipefitter" and "steamfitter" are synonymous for purposes of the *Labour Relations Act* (*D. E. Witmar Plumbing and Heating Limited*, *supra*, at paragraph 9). Consequently, a person must be either a journeyman or apprentice in the plumbing or steamfitting trades within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* to be able to lawfully work or be employed as a plumber or steamfitter respectively in the Province of Ontario.

12. In *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638, the Board observed that:

9. The *Apprenticeship and Tradesmen's Qualification Act* is a statute of general application in the Province of Ontario. Its purpose is to regulate the training and qualifying of tradesmen and, in the case of a compulsory certified trade, to regulate the persons

who can work at various trades so designated. Although it is not for this Board to enforce statutes like the *Apprenticeship and Tradesmen's Qualification Act*, the Board is, in our view, obligated to not make decisions or proceed in ways which are inconsistent with laws of general application which are specifically directed at matters with which it must be concerned in the course of exercising its powers in performing the duties conferred or imposed upon it by or under the *Labour Relations Act*.

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen's Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

(See also *McLeod et al. v. Egan et al.*, (1974) 46 D.L.R. 3rd 150) S.C.C.); *Re Ontario Hydro and Ontario Hydro Employees Union, Local 1000 et al.* (1983) 41 O.R. 2nd 669 (Ont. C.A.)). We agree and find that reasoning equally apposite [sic] to this case which deals with the compulsory certified trades of plumbing and steamfitting.

13. Having regard to section 144(1) of the *Labour Relations Act*, the provisions of the *Apprenticeship and Tradesmen's Qualification Act* and Regulations thereunder, and the designation order referred to in paragraphs 1 and 8 above, the Board is satisfied that a person must be a journeyman or apprentice plumber or steamfitter, within the meaning of the *Apprenticeship and Tradesmen's Qualification Act* in order to be counted as an employee in a bargaining unit described in terms of such tradesmen in an application for certification which relates to the ICI sector of the construction industry.

14. This brings us to the question of whether welders said to be working in the plumbing or steamfitting trades can be considered to be employees in such a bargaining unit. We note that while welding is subject to the provisions of the *Boilers and Pressure Vessels Act*, R.S.O. 1980 Chapter 46, it has not been recognized as a separate trade either under the *Apprenticeship and Tradesmen's Qualification Act* or by the Board. Nor is either welding or welders the subject of any of the designation orders which have been issued to date. Indeed, a number of construction industry trade unions, including the applicant, claim some type of welding as part of their trade jurisdiction.

15. In the result, we find ourselves constrained to conclude that the only persons who perform welding functions who should be included as employees in a bargaining unit of plumbers and steamfitters are those who are either journeymen or apprentices in one or other of those trades.

16. counsel for the applicant referred us to the Board's decision in *Rainscreen Metals Systems Incorporated*, [1989] OLRB Rep. May 482 in which the Board found it appropriate to stipulate in a clarity note that sheeters, sheeters' assistants and material handlers were employees in a bargaining unit of journeymen and apprentice sheetmetal workers. The trade of sheetmetal worker is a compulsory certified trade under the *Apprenticeship and Tradesmen's Qualification Act*. However, there is no indication that the appropriateness of that clarity note was put in issue in that proceeding. Nor is it obvious that the employees working as sheeters, sheeters' assistants and material handlers to which that clarity note refers were other than apprentice or journeymen sheetmetal workers. Finally, the "Sheet Metal Workers" designation entitles the

employee bargaining agency named therein to represent journeymen and apprentice sheetmetal workers and sheeters, sheeters' assistants and material handlers. (There is no reference to welders in the designation order which governs this application). Consequently, the *Rainscreen* decision is readily distinguishable from this case.

17. Counsel for the applicant also complained about the unfairness that would result from a decision which precludes the applicant and its employee bargaining agency from becoming the exclusive bargaining agents of welders who are engaged in the plumbing or steamfitting trade but who are neither journeymen nor apprentice plumbers or steamfitters. He set out the example of construction industry employers who employ primarily or exclusively such welders. Indeed, it appears that it is not uncommon for both unionized and non-unionized employers to employ welders who are neither journeymen nor apprentice plumbers or steamfitters to perform work generally considered to be in the plumbing or steamfitting trade.

18. The Board is not unaware or unsympathetic to the dilemma faced by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada in this respect, particularly since a significant number of its members are (so we understand) welders who are of neither journeymen nor apprentice plumbers or steamfitters. The Board also accepts that, to the extent that it is possible, the Board's practices and policies should reflect and be responsive to the real world of labour relations rather than *vice versa*. However, the applicant cannot have it both ways. Either the *Apprenticeship and Tradesmen's Qualification Act* applies or it does not. The applicant has consistently argued in cases before the Board that it does apply, and the Board, as the *Irvcon Roofing & Sheetmetal (Pembroke) Ltd.* line of cases illustrates, has accepted that argument. As the Board pointed out in *P & M Electric (1982) Ltd.*, *supra*, it is not for this Board to enforce the *Apprenticeship and Tradesmen's Qualification Act* as such.

19. The Board is an administrative tribunal established by the *Labour Relations Act* to administer and apply that legislation. As such it is empowered and obligated "to determine all questions of fact or law that arise in any matter before it" (section 106(1)). However, as a creature of statute, the Board has no powers other than those conferred upon it by or under the *Labour Relations Act* (or other legislation which delegates powers to it; see, for example, section 24 of the *Occupational Health and Safety Act*, R.S.O. 1980 Chapter 321). Consequently, although it is obliged to apply laws of general application the Board has only those powers which have been conferred upon it by statute. The Board has no separate or additional inherent or equitable jurisdiction to "do what it thinks is best". In the Board's view, the solution to any difficulties which may be occasioned by the conclusions it has found itself constrained to arrive at in this case are to be found, if at all, in another forum.

20. We understand that the Ontario Pipe Trades Council has requested that the Minister amend the present designation order so that the employee bargaining agency referred to in paragraph 1 above would be entitled to represent in bargaining in the ICI sector "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices and all qualified welders working in the plumbing and steamfitting trades". Although that may be a solution, we observe that adopting that approach would seem to create a conflict between the designation order and the *Apprenticeship and Tradesmen's Qualification Act*. On the other hand, this kind of apparent conflict has existed for some years between the sheetmetal workers designation and the *Apprenticeship and Tradesmen's Qualification Act* (see *E. S. Fox Limited*, [1989] OLRB Rep. July 738).

21. In the result, the Board is satisfied that it is unnecessary to include the clarity note requested by the applicant herein insofar as it relates to welders who are either journeymen or apprentice plumbers or steamfitters. The Board is also satisfied that the clarity note is not appropriate insofar as it relates to other persons employed as welders working in the plumbing or steamfitting trades since those persons are not properly included as employees in the bargaining unit applied for herein for certification purposes.

See also *E.S. Fox Limited*, [1989] OLRB Rep. July 738 and *Gorf Contracting Limited*, [1991] OLRB Rep. April 483.

35. Assuming that it would make a difference, there is nothing in the evidence before the Board which suggests that Scott Goodlet did not enter into his contract of apprenticeship voluntarily. Although he would have preferred an apprenticeship in a different trade, he was quite content to become an apprentice sheet metal worker until something else came along, which in fact happened subsequently in September, 1994. Goodlet wanted to be registered as an apprentice in any trade, thinking (perhaps incorrectly) that he could easily change to another trade later.

36. Further, as the Board pointed out in *O. J. Pipelines Incorporated, supra*, (and in *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638), the Board applies the *Trades Qualification Act* and regulations to its proceedings but it does not, and does not have the jurisdiction to, enforce or administer that Legislation as such. Consequently, for purposes of an application for certification, the Board is concerned with the *status* of employees under the *Trades Qualification Act* and regulations; in this case, whether they were journeymen or registered apprentice sheet metal workers on the certification application date. On the evidence before the Board in this case, both Goodlet and Drake were registered apprentice sheet metal workers. Whether or not they were wrongly registered is not a matter for this Board. Further, on the evidence, only one of the two was wrongly registered at most, and even if one was wrongly registered any cancellation or voiding of the contract of apprenticeship would not have a retroactive effect.

37. Finally, we observe that Goodlet and Drake would properly be included on the list of employees in the application for certification even if neither had been registered apprentice sheet metal workers on the certification application date. Section 9 of the *Trades Qualification Act* appears to permit a person to work at a trade for which an apprenticeship training program is established without a certificate of apprenticeship or qualification in the trade for up to three months. Accordingly, a person who is not a journeyman or registered apprentice may lawfully work in a compulsory certified trade for up to three months, and is therefore properly included on the list of employees for certification purposes for up to three months from the day s/he begins work in the trade. In this case, both Goodlet and Drake had worked for the responding employer for less than three months at the time the application for certification was made and would therefore be properly included on the list of employees in the bargaining unit even if they had not been registered as apprentice sheet metal workers.

38. The Board is satisfied that there was nothing improper in the responding employer's calling Robert Tarrington back to work from his vacation. He is therefore properly included on the list of employees in the bargaining unit.

39. In the course of the hearing, the applicant conceded that Percy Hoskins was a dependent contractor at all material times. For purposes of proceeding under the *Labour Relations Act*, a dependent contractor is deemed to be an "employee". Accordingly, any change in Hoskins' status from that of dependent contractor to that of an "employee" is immaterial. In any event, the Board is satisfied that this change in status was *bona fide*. Percy Hoskins is therefore properly included on the list of employees as well.

40. In the result, all eleven persons whose names appear on the list of employees filed by the responding employer are properly included on it.

41. In support of its application for certification, the applicant trade union filed evidence of membership with respect to seven persons. It filed six standard Form "Application For Membership" cards, all of which are signed by the person to whom they relate, and five of which relate to

persons whose names appear on the list of employees. The applicant also filed some records with respect to another person whose name appears on the list of employees. These records consist of that individual's personal information and membership dues history. The responding employer does not dispute that the person in question was in fact a member of Local 30 at the times material to this application. However, the company submits that the membership evidence is inadequate or insufficient for purposes of the Board's considerations because it has not been signed by the person to whom it relates and therefore does not comply with the requirements of section 8 of the Act.

42. Sections 8(4) and (5) of the *Labour Relations Act* provide that:

8.- (4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and *signed by each employee concerned*.

(emphasis added)

In addition, the Board's Rules of Procedure contain the following provisions:

1. In these Rules,

- (j) "membership evidence" includes written and *signed* evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union;

• • •

43. An applicant for certification as bargaining agent must also file not later than the application filing date:

- (a) any membership evidence relating to the application;
- (b) a list of employees, in alphabetical order, corresponding with the membership evidence filed;
- (c) a declaration verifying the membership evidence filed in the form set by the Board.

• • •

47. Membership evidence, evidence of objection and evidence of re-affirmation will not be considered by the Board unless the evidence is filed by the application filing date, is in writing,

signed by each employee concerned, and is accompanied by the name of the employer and the name, address, telephone number and facsimile number, if any, of a contact person.

• • •

48. Membership evidence, evidence of objection and evidence of re-affirmation must disclose the date upon which each signature was obtained and must be accompanied by the name of the union, if known.

• • •

49. The Board will not consider oral membership evidence, oral evidence of objection or oral evidence of re-affirmation, except to identify or substantiate the evidence referred to in Rules 47 and 48.

(emphasis added)

Prior to January 1, 1993 there were no analogous provisions in the Act, although sections 73(1) and (2) of the Board's Rules in effect prior to January 1, 1993 provided that:

73.- (1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, *signed by the employee* or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(emphasis added)

43. The *Labour Relations Act* stipulates that the Board cannot consider either evidence that an employee is a member of a trade union which is presented after the certification application date, or which is not signed by the employee to whom it relates. Accordingly, in this case, the Board cannot consider either the documents submitted by the applicant in respect of the employee in question nor any evidence presented subsequently, including the responding employer's concession at the hearing that the person was in fact a member of a constituent trade union of the Conference on the certification application date. Although this result may appear to be somewhat anomalous, it is the result which is specifically required by the Act, and is consistent with the apparent purpose of the Act that a trade union be required to provide evidence of membership support for an application for certification and not merely evidence of membership.

44. In the result, the Board has evidence of employee membership support for the application for certification for five of the eleven persons on the list of employees. The Board is therefore satisfied that at least forty per cent and not more than fifty-five per cent of the employees in the bargaining unit were or had applied to become members of a constituent trade union of the appli-

cant Conference (and by operation of section 10(3) of the Act therefore were or had applied to become members of the Conference).

45. The Board therefor directs that a representation vote be taken of employees in the bargaining unit described in paragraph 8, above.

46. All persons who were employees in the bargaining unit on August 4, 1994, the certification application date, will be eligible to vote.

47. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with 821120 Ontario Inc. c.o.b. as Heritage M & E and/or Mette Plumbing.

48. Finally, we turn to the applicant's allegation that the responding employer discharged Brad Bull in part because the company believed he was "behind" the organizing drive which led to the application for certification herein. (The disposition of this issue cannot affect the certification application.)

49. Bull is a journeyman sheet metal worker. He was employed by the responding employer from early August, 1993 until he was laid off on October 17, 1994.

50. Bull testified that before he began work on the morning of August 4th, 1994 (the certification application date), David Saltern, the responding employer's shop working foreman who was also included in the bargaining unit, told him that "this is the day the union deal is going down", that management knew and was unhappy about it, that management thought it knew who was behind the applicant's organizing drive, and that he should be careful. Bull said that he thought he was laid off some two and one-half months later because the company believed he was instrumental in the organizing campaign.

51. Saltern testified that he told Bull that Greg Heenan, the responding employer's Office Manager and Saltern's brother-in-law, had told him that the application for certification was going to be filed on August 4th, and that Heenan was upset about this. Saltern also confirmed that he told Bull he should be careful because he thought that Bull could lose his job because of the applicant's attempts to certify the company. Saltern offered no basis for this belief.

52. It is difficult to see how the responding employer could have known, early in the morning of August 4th, 1994, that the application for certification was going to be filed that day. Hasler denied that he knew of it until sometime later, but Heenan did not testify. Consequently, Saltern's evidence on the point is uncontradicted. Accordingly, for purposes of these proceedings we assume that at least Heenan somehow "knew" that the application was going to be made, and that he was unhappy about it.

53. Saltern conceded that neither Bull's name, nor that of any other employee came up during his exchange with Heenan on August 4th, 1994. He did not suggest any basis for his concern about Bull's future as an employee with the company. There is no evidence that anything at all was said about it subsequently. Further, it is clear that there was in fact a shortage of work which justified the series of lay-offs, which included Bull's, in September and October, 1994. Indeed, the applicant did not suggest that a lay-off was unjustified; it alleged that Bull should not have been the one laid off because of his relative seniority.

54. In fact, Bull was one of three shop employees laid off on October 17, 1994. At least two journeymen sheet metal workers employed in the field had been laid off earlier. At the time Bull

was laid off, the company had three sheet metal workers with less seniority than Bull: Gary Taylor, Larry McKay and Martin Drake.

55. The Board heard very little evidence about McKay. It appears that he is a journeyman sheet metal worker who worked in the field for the company. Drake is the apprentice sheet metal worker we referred to earlier. The applicant did not suggest that McKay or Drake should have been laid off instead of Bull. It focused on Gary Taylor.

56. Although Bull worked in the field on occasion, he generally worked on smaller jobs as a short term replacement in or addition to the employer's complement of field employees. Indeed, he spent approximately eighty per cent of his time in the shop. As indicated above, Taylor is a journeyman sheet metal worker who at all material times was a working foreman on the company's Sir Sanford Fleming plumbing job site in Lindsay. As such, he was the person most familiar with that job site, and even Bull reluctantly conceded that it made the most sense to keep Taylor on that job.

57. The responding employer was under no obligation to lay off its employees in order of seniority. On the evidence, the Board is satisfied that it made good business sense to retain the working foreman on a major project instead of replacing him with someone who is primarily a shop employee and who was not familiar with the project.

58. Finally, if the responding employer was as familiar with certification process as the applicant asserts and as the evidence suggests it was, the company would have known that the application for certification could not be negatively affected by a discharge or lay-off subsequent to the certification date. The applicant's entitlement to certification or to a representation vote depends on a membership support for its application among employees in the bargaining unit on the certification application date, and where a representation vote is taken in the construction industry application for certification only employees in the bargaining unit on the certification application date are eligible to cast ballots (*Crete Flooring Group Limited*, [1992] OLRB Rep. July 792).

59. The Board is therefor satisfied that there was no connection between the application for certification and Bull's lay-off two and one-half months later.

60. In the result, the section 91 application is dismissed in its entirety.

61. The application for certification is referred to the Registrar to deal with the representation vote ordered by the Board in paragraphs 45, 46, and 47 above.

2454-94-R; 2838-94-U United Brotherhood of Carpenters and Joiners of America Local 1072, Applicant v. **Jones Wood Industries Inc.**, Responding Party v. Group of Employees, Objectors

Certification - Charges - Evidence - Intimidation and Coercion - Membership Evidence - Board inquiring into reliability of union's membership evidence following disclosure that employee who had signed union cards as "witness" had not seen employees sign the cards - Board satisfied on the evidence that there was no intention to mislead Board - Board satisfied that employee who had countersigned cards was in position to confirm that the persons had signed the cards and wished to belong to the union - In all the circumstances, Board seeing no reason to reject cards submitted, nor to order representation vote - Board finding that charges of intimidation and coercion in collection of membership evidence not made out - Certificate issuing

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. M. Sloan* and *K. Davies*.

APPEARANCES: *Marisa Pollock* and *Joe Almeida* for the applicant; *Bill Anderson* and *Reinhard Zank* for the responding party; *Daniel J. McKeown*, *Daniel Stoikoff*, *Ghansham Maharaj* and *Kiem Lam Nghiem* for the objectors.

DECISION OF S. LIANG, VICE-CHAIR, AND BOARD MEMBER K. DAVIES; March 29, 1995

1. This is an application for certification which has been joined for hearing with a complaint of unfair labour practices. The complaint of unfair labour practices and related request for relief under section 9.2 of the *Labour Relations Act* was withdrawn during final argument by the union.
2. In this application the Board has issued a previous decision, dated February 2, 1995 [now reported at [1995] OLRB Rep. Feb. 134], explaining the circumstances under which certain issues came to light, and the reasons for certain rulings which it has made during this hearing. One of the Board's rulings was made in response to the union's motion to dismiss an allegation respecting an apparent irregularity in the membership evidence, as disclosing no *prima facie* case. The Board rejected the motion, finding that it would hear the evidence as to the circumstances underlying this apparent irregularity. The Board, however, (R. M. Sloan dissenting) on the basis of the facts and allegations before it, found no *prima facie* case warranting an inquiry into the Form A-4 declaration filed in this application. Two issues remain in this hearing. The first is whether the membership evidence filed in support of this application, which shows that the union enjoys the support of more than 55% of the employees in the bargaining unit, should be discounted because of the apparent irregularity on the cards. The irregularity on the cards (which was initially brought to the parties' attention by the Board during the course of hearing evidence) is that Jimmy Smith, the employee of Jones Wood responsible for the organizing drive, signed as a "Witness" on membership cards without, in most cases, actually seeing the applicant for membership sign the card. The second issue is whether this same membership evidence should be discounted because of intimidation and coercion during the organizing drive by the union's main organizer.
3. Both the employer and the group of employees objecting to this application take the position that the application should be dismissed. In the alternative, they request that the Board order a representation vote to confirm the wishes of the employees.
4. Both the objecting employees and the union called a number of witnesses, with respect to both elements of this case. The employer called no evidence. The Board has assessed the evi-

dence before it having regard to the usual testimonial factors, ultimately determining what is most reasonable and probable in all of the circumstances. On the issue of the irregularity in the cards, there is little factual dispute. On the issue of the intimidation and coercion allegations, there are some inconsistencies between the evidence of Mark Maharaj and Jimmy Smith, and between the evidence of Kiem Lam Nghiem and Jimmy Smith. Where we have had to resolve inconsistencies for the purposes of our findings, we have done so and indicated the reasons for our findings.

Facts - The Irregularity in the Cards

5. The organizing drive began near the end of August, 1994. A business agent for the applicant, Joe Almeida, approached Mr. Smith on or about August 24 outside the workplace. Mr. Smith decided to join the union, and agreed to assist in organizing. On August 25, he met Mr. Almeida again, along with three other employees. It was decided that Mr. Smith would take on the responsibility for the organizing drive, assisted by the others. It was decided that any cards collected would be given back to Mr. Smith. Mr. Smith and one of these employees took membership cards with them to work on August 26 and started distributing them. Over the course of the next few weeks, Mr. Smith approached everyone in the workplace, most of them in the first few days. He asked employees if they were interested in joining the union. If they indicated interest, he asked if they had received a membership card, and if they had not, he gave them one.

6. Mr. Smith received all of the cards back, most within the first few days. Two employees signed their cards with Mr. Smith present. The rest were signed without Mr. Smith being present. Most employees gave their cards directly to Mr. Smith, and others gave them to other employees to pass on to him. All of the cards which Mr. Smith received during the course of a day were kept by him and taken home at the end of the day. He countersigned all the cards at home later in the same day that he received them, even the ones which he personally observed being completed during the day. On some cards, where employees failed to fill in the date portion, Mr. Smith completed the date as well as countersigning the card. He used the date on which he received and countersigned the card. Mr. Smith was not under the impression and was never told, that he was required to watch employees sign the membership cards.

7. It was Mr. Smith's practice to thank every employee personally from whom he received a card. When he did not receive the card directly from the cardsigner, he sought that person out sometime on the same day. Mr. Smith thanked the employees for their support, on behalf of the union. He adopted this practice because he felt a personal responsibility for the organizing drive, and he felt he should personally let employees know that their support was appreciated. In doing this, he hoped to keep morale high. Mr. Smith states that although he did not seek out the main role in the organizing drive, having taken it on he saw it as a responsibility. His evidence on this was straightforward and credible. Mr. Smith is one of the most senior employees at this workplace, and it is evident that he is seen as somewhat of a leader. The evidence also indicates that he sees himself as having somewhat of a leadership role on behalf of employees in their dealings with Jones Wood. It is consistent with this that Mr. Smith saw it as important to have personal contact with each employee who agreed to join the union, both before and after he received their cards.

8. In his evidence, Mr. Smith agreed that he could not swear with 100% certainty that every card which he received bore the authentic signature of the employee indicated on it, but he stated that based on what he knew, he had no reason to doubt that it was so.

9. During cross-examination of Mr. Smith by counsel for the employer, the following exchange occurred:

- Q. What does witness mean; doesn't it mean you are witnessing the signature?
- A. Yes, o.k.
- Q. You've done that before with other legal documents, witnessing someone's signature, or having someone witness yours?
- A. Um, o.k.
- Q. You know it means I've witnessed someone signing their name?
- A. Yes, o.k.

During re-examination of Mr. Smith, the evidence included:

- Q. Did Joe ever tell you you had to watch a person signing a card.
- A. No, I don't think so.
- Q. Today when you were answering Mr. McKeown's questions you were asked who decided you would witness the cards. You said it was discussed between you and Joe. Based on those discussions, what did you understand you were doing when you signed your name as witness to those cards?
- A. Confirming that the signatures on the cards were their's and they wanted the union.

10. Mr. Smith's evidence, as we have indicated, was given in a candid and straightforward manner, never hesitating to answer even where it might have been against his interests. On all of his evidence, including the exchanges set out above, we find that Mr. Smith at no point meant to represent with his signature on the cards that he had actually watched the applicant sign the cards. We are satisfied that if there was a misrepresentation on the cards, it was not intentional. Rather than intending to represent that he had observed the signatures, his intention was to indicate that he could "vouch" for them.

The Facts - Intimidation and Coercion

11. We now turn to the evidence concerning Mr. Smith's dealings with Mr. Lam. On the basis of all of the evidence, we find that Mr. Lam was in a very anxious state when he decided to sign his membership card. The decision to join the union was a very difficult one for Mr. Lam. Mr. Lam was quite afraid of the effect that unionization might have on the viability of the company, because he was under the impression that sometimes when a company unionizes, people lose their jobs. As a result, he resisted getting involved, and tried to avoid the issue with Mr. Smith, even to the point of taking a week away from work in the hope that by the time he returned, the union issue would have been finished.

12. There were some discussions between Mr. Lam and Mr. Smith about what would happen in the event that the company was unionized, and he did not support it. Mr. Smith told Mr. Lam that if the majority wanted a union, there would be a union. Mr. Lam wanted to know whether he had a choice, and whether he would still be able to work there, to which Mr. Smith stated that he thought that if the union came in, Mr. Lam would have to pay dues. Mr. Lam wanted to know what would happen if he did not want to pay dues, and whether he could be fired. Mr. Smith stated that he did not think Mr. Lam would be fired, he was not in any position to do such a thing, and also told Mr. Lam that if he wanted to know more, he could phone the union representative directly or come to a meeting.

13. There was evidence that Mr. Lam found some damage to his car one day, and told Mr. Smith that he thought “the union” was responsible, which Mr. Smith denied. There is no evidence that there was any basis for Mr. Lam’s belief. On that same night, Mr. Lam decided to sign the membership card and gave the card to another employee the next day to give to Mr. Smith. He also asked the employee to tell Mr. Smith “Now shut up” when he handed the card in. When Mr. Smith was given this message, he was concerned and spoke to Mr. Lam. He told him that if he had doubts about his choice, he would give his card back. Mr. Lam refused the offer and Mr. Smith thanked him for his support.

14. As we have indicated, the decision to join the union was a very difficult one for Mr. Lam, who apparently felt pulled in opposite directions. Although he testified that he was told by Mr. Smith that if he did not sign the card and the union came in, he was “finished” or that he would be fired, we find on all of the evidence that Mr. Lam’s anxieties about the consequences of refusing to join the union were based on his misapprehension of the nature of his conversations with Mr. Smith about union security. Mr. Lam unintentionally magnified in his own mind the meaning of what Mr. Smith conveyed. We also find that, although Mr. Smith did not totally clarify the issue, since he was himself unsure about some of the details, there was nothing in what Mr. Smith said that would have led a reasonable employee to believe that he would lose his job if he did not sign a membership card during the organizing drive. This is particularly so where the opportunity to seek further information and clarification was offered.

15. Mark Maharaj also gave evidence respecting alleged intimidation by Jimmy Smith during the course of the organizing campaign. Also introduced into evidence were a number of handwritten notes either created by Mr. Maharaj or by another employee, Dan Stoikoff, on Mr. Maharaj’s instructions. All of these notes are said to have been written at the time that the events recounted within them occurred. Ultimately, the Board has determined that it cannot accept much of this oral or written evidence. Aspects of the testimony relating to the creation of the documents and to the events during the time of the organizing drive were at best implausible and at worst patently contrived. There were numerous inconsistencies and variations in the evidence from one moment to another. We do not rely on the notes for the truth of their contents, and we accept certain parts of Mr. Maharaj’s oral evidence but not others. Certainly, where the testimony of Mr. Maharaj and that of Mr. Smith conflict, we prefer that of Mr. Smith.

16. We find that Mr. Smith first approached Mr. Maharaj about signing a membership card on or about August 26. Mr. Maharaj did not express opposition to the idea of joining the union and Mr. Smith understood that he would join. It became clear, however, over the course of the next week or so that Mr. Maharaj would not join. On or about August 31, there was a conversation between Mr. Smith and Mr. Maharaj in which Mr. Smith said something similar to: “you’re a fool; I’m giving you one more chance to sign a card”. Mr. Maharaj states that because of this statement, he began to wonder whether Mr. Smith had the power to fire him if he did not join the union. We find that if Mr. Maharaj took this meaning from this conversation, it was not a reasonable interpretation.

17. Mr. Maharaj became instrumental in attempting to organize opposition to the union. On one occasion, he tried to conduct a vote using a ballot box in the lunchroom. On another occasion, he approached various employees to sign a petition against the union. Because of these activities, he and Mr. Smith had some confrontations, and exchanged heated words. Each was equally vocal and assertive to the other. In at least one exchange, Mr. Smith told Mr. Maharaj that what he was doing was illegal and he could be sued for it. In another exchange, Mr. Maharaj used a profanity, and Mr. Smith responded by saying something to the effect that if the union came in, he would find it hard to help Mr. Maharaj, and he might have to kneel down and grovel before he

came to his assistance. In another exchange, Mr. Maharaj stated that he had promised his father that he would never pay union dues. Mr. Smith stated that if the union came in and he did not want to pay dues, he guessed he would have to leave.

18. At several points in his evidence Mr. Maharaj alleges that Mr. Smith stated to him that he would be “kicked out” or “out of a job.” He testified that at least once of these threats was related to his refusal to join the union (Mr. Maharaj never signed a card). In cross-examination, Mr. Smith denied having made such threats, although when asked if it was “possible”, he stated, “it is possible, I guess, if things got hot”. On all of the evidence, we find it unlikely that if Mr. Smith made threatening comments to Mr. Maharaj, they were linked to his refusal to sign a union card. It is evident that Mr. Maharaj was known as an ardent opponent of the union and this led to friction between himself and Mr. Smith. The two men had some heated exchanges over the issue, which continued to occur well past the filing of the application for certification. There was evidence that Mr. Maharaj complained to management about being harassed by union supporters, but it does not appear that he ever complained that he was being threatened with job loss if he did not join the union during the organizing drive. Mr. Maharaj acknowledges having conversations with Mr. Smith about union dues, in which Mr. Smith told him that if the union came in, whether or not he had signed a membership card, he would have to pay union dues. Mr. Maharaj vowed he would never pay dues. In light of Mr. Maharaj’s strong convictions against unionization, it may have been that he felt it would be impossible for him to remain at the company if the union were certified. Finally, even while maintaining that Mr. Smith threatened him in this manner, he states that he did not believe Mr. Smith.

19. Taking into account all of the above, we are satisfied that Mr. Smith did not threaten Mr. Maharaj with the loss of his job if he did not sign a union card. We find that Mr. Smith made some intemperate, ill-considered and high-handed remarks to Mr. Maharaj in the context of heated discussions over unionization, but they were not made in an effort to coerce him into signing a union card and in the context in which they were made they carried and were seen by Mr. Maharaj as carrying little weight.

20. The Board does not find it necessary to set out the arguments of the parties, although it is indebted to counsel for their thorough and thoughtful submissions. Although the Board was provided with a number of its decisions dealing with allegations of intimidation and coercion in an organizing drive, ultimately, our determinations on this issue in this case were based primarily on our factual findings. On the issue of the effect of the irregularity in the cards, the Board was provided with the following decisions: *Crock & Block Restaurant and Tavern*, [1980] OLRB Rep. Apr. 424; *Emanuel Products Limited*, [1977] OLRB Rep. Feb. 37; *Grand & Toy Limited*, [1986] OLRB Rep. Sept. 1223; *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444; *Transcor Inc.*, [1993] OLRB Rep. Nov. 1233; *Flo-Con Canada Inc.*, [1989] OLRB Rep. July 752; *Maple Leaf Mills Limited*, [1984] OLRB Rep. Oct. 1474; *Radio Shack*, [1978] OLRB Rep. Nov. 1043; *Pietrangelo Masonry*, [1981] OLRB Rep. Feb. 218; *Beatty-Hall Construction Co. Limited*, [1983] OLRB Rep. Jan. 19; *Seeburn Division of Ventra Group Inc.*, [1994] OLRB Rep. Nov. 1585; and *Edmonton Separate School Board*, [1988] Alta. L.R.B.R. 33.

Decision - The Irregularity in the Cards

21. In *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444, the Board discussed the nature of certification proceedings:

11. The object in certification proceedings is to determine whether a majority of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* is structured so that, except where a pre-hearing vote is requested, the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of the application. The Board does not inquire into opinions of the virtues of trade union representation except as evidenced by the applicant's documentary evidence and any timely petitions filed in opposition to the application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of the bargaining unit employees in cases where either the applicant trade union does not have the support of more than fifty-five percent of the bargaining unit employees, which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to direct that a vote be taken notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of membership evidence as the means by which employee wishes are to be ascertained.

12. Accordingly, the Board relies heavily upon the membership evidence filed by an applicant trade union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which, pursuant to section 111(1) of the Act, is not usually disclosed to the employer or employees opposing the application and is not usually subject to cross-examination, the Board requires a high standard of integrity and precision in the nature and quality of membership evidence. In order to protect the integrity of a certification process which places heavy reliance upon what is essentially hearsay evidence of support for an application for certification, the Board requires trade unions to be scrupulous in the manner in which they conduct their organizing campaigns and obtain membership evidence. Accordingly, the Board must consider any substantial allegations which, if proved, might cast doubt on the reliability of membership evidence. Evidence of improper conduct by a trade union or its supporters may raise sufficient doubt as to whether that documentary membership evidence filed in support of an application for certification is a reliable indicator of employee support for the applicant to cause the Board to resort to the confirmatory evidence of a representation vote notwithstanding that the membership evidence shows, on its face, the union to have the support of more than fifty-five percent of the employees (see *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. April 346; *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611. . . .

22. The latter comments above apply to situations where the Board is faced with allegations that the union has intimidated or otherwise unlawfully compelled employees into signing membership cards, as well as to situations where there may be some irregularity in the cards themselves (such as an allegation that a person who is purported to have signed a card, has not signed). As is clear from the above passage, in the ordinary course, the Board determines whether a trade union has sufficient support for certification based primarily upon a review of membership cards submitted by the union in support of its application. Allegations of misconduct either in an organizing drive or in the collection of membership evidence may cast doubt on the Board's ability to rely on these membership cards in its determination of the primary question, whether the employees in the bargaining unit wish to be represented by the applicant trade union.

23. The Board has sometimes stated that it is prudent for unions to submit witnessed membership cards to the Board, but it is neither a statutory condition nor a requirement of the Board's Rules that membership evidence be witnessed. Section 8(5) of the Act, which is a codification of section 73(1) of the Board's old Rules of Procedure, simply states that evidence of membership in (or opposition to) a union must be "in writing and signed by each employee concerned". Much of the membership evidence received by the Board bears the signature of a witness. Some does not. Some membership evidence bears the signature of a "receiver" or a "collector". In addition, the membership evidence submitted by different unions can include information on employees'

addresses, job classifications, seniority and a host of other details, none of which is necessary for the purposes of the Board's determinations under section 8.

24. Just as with any other kind of misstatement as to a non-essential piece of information contained on a membership card, the Board must determine whether the misstatement which we have found to be the case here is so serious that it puts in doubt the Board's ability to rely on the membership evidence for the purposes of its determinations under section 8. The essential question for the Board here is whether it can reasonably rely on the membership evidence submitted as proof of employees' wishes. As the Board has stated previously, in matters of this kind, where there is an irregularity in the membership evidence, the Board's concern is not with penalizing a union, but with *representation*: see *Inco Limited*, [1966] OLRB Rep. Jan. 698 quoted in *Crock & Block Restaurant and Tavern*, *supra*. Since it is neither practical nor desirable for the Board to interview each employee concerned to determine whether they signed the membership cards and wish to be members of the applicant, it is necessary for the Board to be satisfied that the membership evidence can be a reliable basis on which to make its determinations under section 8.

25. In deciding whether membership evidence is reliable even in the presence of an irregularity, the Board takes into account the nature of the irregularity, the extent of its occurrence, to what extent the card was submitted with knowledge of its irregularity, and whether the persons responsible for the irregularity were instrumental in the organizing drive such that it can be inferred that their actions cast doubt on the reliability of other cards.

26. Most of the cases which were placed before us relate to allegations of "non-pay" or "non-sign", or to circumstances where the Form A-4 was apparently incorrect, and there are varying responses from the Board depending on the facts in each case. In some cases, the Board found that the circumstances warranted rejection of one or more of the cards submitted in support of the application. In other cases, irregularities with respect to one or more cards led to a representation vote where the Board had reason to doubt the reliability of all of the membership evidence. In yet other cases, the Board found the Form A-4 unreliable as a result of the irregularities and dismissed the application. There are also cases where despite the rejection of one or more cards, the other cards and the Form A-4 were found to be reliable. It is clear that, depending on the circumstances, an irregularity with respect to one card may "taint" other cards or undermine the reliability of the Form A-4; however, not every irregularity, even a non-pay or non-sign, leads to the rejection of other cards or of the Form A-4: see *Can-Eng Metal Treating Ltd.*, *supra*.

27. Where a "non-sign" (and, prior to the time when the Act was amended to remove the requirement of the payment of \$1.00, a "non-pay") allegation is proven, the card in question must be rejected, since it no longer meets the statutory requirement for evidence of trade union support. Whether or not one or more instances of non-pay or non-sign casts doubt on the rest of the membership evidence depends on the facts of the case: see *Crock & Block Restaurant and Tavern* and *Can-Eng Metal Treating Ltd.*, *supra*, as examples of two different responses by the Board. Whether or not irregularities apart from non-pay and non-sign cases lead the Board to question or reject the membership evidence also depends on all of the circumstances. In *Maple Leaf Mills Limited*, *supra*, for instance, the Board permitted the applicant to establish the identity of the collectors of the \$5 membership fee through oral evidence, where the membership evidence contained no information identifying the collectors. In that case, the Form 9 [now Form A-4] required the declarant to attest that "the persons whose names appear on the receipts . . . are the persons who actually collected the moneys paid". The Board therefore also required the applicant to call evidence to establish how the declarant could attest to such a fact without the identities of the collectors being shown on the receipt portion of the membership evidence. Ultimately, the Board con-

cluded that both the membership evidence and the Form 9 were reliable and gave them full weight. The Board stated, in the course of its reasons:

11. Counsel for the applicant acknowledged that Mr. Pretty had not treated the Form [sic] 9 Declaration with proper respect, and that no excuse could be made for him in that regard. Having heard Mr. Pretty's evidence, we would add to his counsel's acknowledgement the observation that Mr. Pretty adopted a cavalier attitude to documentation generally. We find it completely unacceptable that a trade union official would sign documents in blank, and leave it to someone else to complete them. The issue with which we have been faced, however, was not whether Mr. Pretty's behaviour or approach was acceptable, but whether the applicant's membership evidence was satisfactory. After hearing the evidence and the submissions of counsel, we determined that the evidence was satisfactory. . . .

28. The Board was referred to a decision of the Alberta Labour Relations Board, in *Edmonton Separate School Board, supra*. We find this case distinguishable from the one before us. Not only does it occur under a different statutory regime, but in that case, it was established that one of the purported cardsigners had not in fact signed. Yet a collector had signed the card as a witness, and did not testify to explain how it was this occurred. The Board had no choice but to have serious doubts as to all the cards collected by this person.

29. The Board was also referred to *Emanuel Products Limited, supra*, which we find to be distinguishable from the case before us. This case is similar to the present one in that no non-pay or non-sign was ultimately established on the evidence. The irregularities were that some persons who signed as a witness on the cards did not in fact witness the signing of the cards, and some persons who signed as recipients of the membership fee were not in fact the persons who received the payment of the fee. The Board, after hearing the evidence, determined that it could not rely on the membership cards submitted by three individuals and in any event, could not rely on the Form 8 [now A-4]. With respect to the three collectors, the Board found that "[h]aving regard to the totality of the evidence and particularly to the manner in which cards were gathered" it could not give any weight to the cards handled by them since "[t]heir actions and testimony demonstrate a fundamental misunderstanding of the meaning of the documents they circulated and collected."

30. The Board also found that the Form 8 declarant knowingly submitted a false declaration. It found that at the time he completed the Form 8 declaration, he was aware of the defects in the membership evidence, only some of which were disclosed on the form.

31. The Board stated in the course of its decision:

9. It makes no difference that the Board's doubts about the probative weight of these cards were raised by irregularities not specifically relating to the failure of individual applicants to sign the cards or pay the initiation fee (*Collingwood Shipyards, Division of Canadian Shipbuilding and Engineering Ltd.*, 67 CLLC 16,017). It does not lie in the mouth of the union to say, as it does, that the irregularities disclosed should not affect the merits of its application since witnessed signatures on applications and collector's signatures on receipts are not strictly required by the Board anyway, and so need not have been provided in the first place. Firstly, it would be more accurate to say that an applicant that does not provide witnessed application cards and receipts signed by the collector and countersigned by the applicant does so at its peril. . . . Secondly, it should be noted that Form 8 contains the following:

3. "(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues [sic] or initiation fees and that each member, on whose behalf a receipt or an acknowledge-

ment of payment is submitted has personally paid in money the amount show thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:"

32. The Board found the statement contained in paragraph 3 of that declaration to be false. The Board went on to state:

10. The primary issue in any certification proceeding is the ability of the Board to rely on the documentary evidence filed. When a union has chosen to provide the certainty of witnessed signatures and signed receipts to bolster the integrity of its evidence and has, whether through carelessness or design, misled the Board in that regard, there may be raised in the Board's mind doubts as to the entire credibility of the applicant's documentary evidence. Having regard to the strict standards of integrity required of such evidence, the Board may, in such circumstances and having regard to all of the evidence, reasonably refuse to attach any probative value whatsoever to any of the cards or to the Form 8 declaration filed in support of the application.

33. We do not conclude from the above case that any misstatements on a membership card will affect the merits of a certification application. Clearly, there are some misstatements which are so inconsequential that they raise no doubts as to the reliability of the cards. Other misstatements may give rise to more doubts and require a hearing. The Board's comments in *Emanuel Products Limited* merely confirm this panel's assessment at the beginning of this exercise: that the type of irregularity before us raised some doubt as to the reliability of the documentary evidence and for that reason it was necessary for the Board to hear evidence on the matter. However, at the end of the day, the Board must, as it did in *Emanuel Products Limited* determine whether in all the circumstances and having regard to all of the evidence, it can reasonably rely on the membership evidence.

34. In *Emanuel Products Limited*, the Board had grave reservations about the manner in which the cards were handled by the three collectors in issue, and about the manner in which the Form 8 was completed. In the latter respect, it is important to note that Form A-4, reflecting the change in statutory requirements, does not contain the same paragraph 3 as in Form 8. The Board found that the Form 8 filed in the above case was false because it warranted that the persons whose names appeared on the receipts were the persons who actually collected the moneys paid, which was found to be untrue. The Board found that the Form 8 declarant knew of this prior to completing the Form 8.

35. In the case before us, the Board initially scheduled a hearing to hear the evidence and representations of the parties relating to allegations that the union's main organizer, Jimmy Smith, had intimidated employees into signing membership cards. The union had also filed a complaint of unfair labour practices (which was withdrawn during final argument). During the course of hearing the evidence into the allegations of intimidation, the Board drew to the attention an apparent contradiction between the evidence of Mr. Lam, and the membership card relating to Mr. Lam. Although the union took the position that the facts which the Board drew to the parties' attention warranted no further inquiry, the Board determined that there was at least a *prima facie* case on which to proceed. Although in another situation there may be defects on membership evidence that are so clearly extraneous to its central purpose that the Board might see no reason to inquire further, the type of irregularity disclosed here raised at least some doubt as to the reliability of the membership evidence and for that reason it was necessary for the Board to hear evidence on the matter.

36. Having heard the evidence, the Board is satisfied that the manner in which the cards were collected by Jimmy Smith and, in particular, the manner in which the cards were counter-

signed by Jimmy Smith, do not cast doubt on the reliability of the cards as evidence of the employees' wishes to be represented by the applicant.

37. We are satisfied that there is a misrepresentation on the face of the cards, although on the evidence, we find that the misrepresentation is innocent and inadvertent. In the Board's understanding, the term "Witness" implies that the person who has signed as a witness is attesting to the fact that he or she has seen another person affixing his or her signature to a document. This is the normal and accepted meaning of the term "witness" on membership evidence, and upon seeing a card with a witnessed signature, the Board would normally conclude that this is what has occurred.

38. The Board has now heard that the signatures of approximately twenty-three of the twenty-five cardsigners for which Jimmy Smith has signed as a "witness" were not actually witnessed by him. We are also satisfied on the evidence that to the extent that the cards bear a misrepresentation, Jimmy Smith did not intend to mislead the Board. On the evidence, he did not intend to represent to the Board that he actually witnessed the signatures of the cardsigners. His evidence on this issue, which was given in a candid and straightforward manner, was that he intended to confirm that the individuals shown on the cards had signed the cards and wished to belong to the union. The Board has also heard evidence as to the manner in which Mr. Smith distributed cards, contacted employees, and collected the cards and his practice of thanking each cardsigner once he received a card from that person. We are satisfied that when Mr. Smith countersigned the cards he collected, he was in a position to confirm with reasonable certainty those facts that he intended to confirm with his signature, i.e., that the persons had signed the cards and wished to belong to the union.

39. In the absence of any other reason to doubt the reliability of the membership evidence collected by Mr. Smith, his misstatements on the cards when taken in the context of his stated intentions, his basis for being able to attest to the validity of the cards and his general procedures for distributing and collecting the cards, do not call into question the essential information conveyed by the cards. The Board has confirmed the signatures which appear on the cards with the sample signatures submitted by the employer. The evidence of Mr. Smith is consistent with the sample signature comparison, as is the Form A-4 declaration. The Board accordingly sees no reason on the basis of these misstatements to either reject the cards collected by Mr. Smith or to order a representation vote to confirm the employees' wishes.

40. Before we conclude, we wish to comment on an issue raised by Board Member R. M. Sloan in his dissenting opinion. Reference is made to Rule 48 of the Board's Rules of Procedure, which states that "[m]embership evidence . . . must disclose the date upon which signature was obtained . . .". The evidence has established that with respect to at least one card, that of Mr. Lam, the card was dated by Mr. Smith on a day later than when Mr. Lam signed it. Mr. Smith also acknowledges dating some other cards whose dates were left blank by their card signers. There is, therefore, the potential that the date shown on these cards is different from the date the *employees* signed them. Rule 48 was not raised by counsel in their argument; thus the Board does not have the benefit of their views on the effect of apparent non-compliance with respect to at least one card with Rule 48. In any event, as with any example of non-compliance with the Rules, whether or not the Board will: accept a defective document; accept a late filing; accept late amendments to filings; or take any other action, are decisions to be made in the circumstances of each case. In the circumstances of this case, we are satisfied that the inaccuracy in the date on at least one card does not warrant rejection of any cards. If there is a difference between the date an employee signed a card and the day Mr. Smith dated the card, it is not likely to be more than a few days in duration; in any event, the evidence establishes that all of the cards were signed between August 24, 1994 and the date of application.

The Intimidation and Coercion Allegations

41. We now turn to a consideration of the allegations regarding Mr. Smith's conduct during the organizing drive, and the allegations that he intimidated Mr. Lam and Mr. Mark.

42. On balance, as we have indicated above, we find that it is likely that Mr. Smith, in the heat of an argument in which Mr. Maharaj was as much a protagonist as himself, made some threatening and derogatory comments to Mr. Maharaj. We also find, however, that these comments were not intended to compel Mr. Maharaj to join the union. Rather, they were, as were Mr. Maharaj's comments to Mr. Smith, angry words by a person of strong conviction to another person of equally strong conviction. It is clear that some persons in this work force have strong feelings about unionization, either in favour or against. The Board does not condone heavy-handedness or ill-tempered and ill-considered remarks from either side; however, it is not the place of the Board to step in unless it is clear that threats or intimidation are being used as a way to either compel a person to join a union, refrain from joining a union or prevent him or her from exercising other rights under the Act.

43. As we have noted, Mr. Maharaj did not join the union. In light of this, the argument of the employer and the objecting employees relates to the probability that if Mr. Smith engaged in the behaviour of which Mr. Maharaj complains, other employees were subject to the same coercion and the Board should not treat the membership evidence as voluntary. We have found that it is unlikely that Mr. Smith made any threat to Mr. Maharaj that he would lose his job if he did not sign a membership card. We therefore have no basis on which to conclude that any of the membership evidence collected by Mr. Smith was obtained using intimidation and coercion of the type alleged by Mr. Maharaj.

44. As we have also indicated above in our recounting of the facts, we have determined that it is unlikely that Jimmy Smith threatened Mr. Lam that if he did not sign a membership card, he would lose his job. Mr. Lam did have some anxieties about the prospect of unionization, and he also appeared to have some suspicions about the conduct of the union's supporters. However, we have found no objective basis for the latter, and in all of the circumstances, including the conversation between Mr. Lam and Mr. Smith after he decided to join the union, we have no reason to discount or doubt Mr. Lam's membership card.

45. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

46. Except with respect to the emphasized portions, the parties agreed on the following bargaining unit description:

all employees of Jones Wood Industries Inc. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson *and pending resolution by the Board, excluding as well, office and sales staff.*

The applicant's position is that office and sales staff should be included in the bargaining unit. The respondent's position is that office and sales staff should be excluded, either because they have no community of interest with the rest of the bargaining unit, or because they have access to confidential information which would bring them under section 1(3) of the Act. The applicant also seeks to have four persons added to the list of persons in the bargaining unit at the time of the application. Having regard to the agreement of the parties at the hearing, the Board remits the remaining

issues to the parties to attempt a resolution, failing which the parties may contact the Board to have the matter re-listed or a Labour Relations Officer appointed.

47. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the disputed classifications. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit on October 13, 1994, the certification application date, had applied to become members of the applicant on or before that date.

48. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, having regard to the agreement of the parties and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for all employees of Jones Wood Industries Inc. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, and pending the resolution of the status of these categories, excluding as well office and sales staff.

49. A final certificate must await the final determination of the appropriate bargaining unit.

50. Having regard to the position of the applicant at the hearing, Board File No. 2838-94-U is hereby dismissed.

DECISION OF BOARD MEMBER R. M. SLOAN; March 29, 1995

1. I dissent from the majority decision with respect to the membership evidence and the Form A-4.

2. It should be noted at the outset that the concern about the membership evidence was not raised by the employer or the objectors, but by the Board itself, following testimony given by Mr. Kiem Lam Nghien (Mr. Lam) that he took home his membership card, signed it at his home, and upon his subsequent return to the plant had the card returned to Mr. Noah J. Smith (Mr. Smith) through Mr. Terry Kelly, his helper.

3. Reference by the Board to Mr. Lam's membership card showed that it was witnessed by Mr. Noah J. Smith, and this prompted the ensuing enquiry.

4. I dissented in the 2 February, 1995 interim decision where the majority in paragraph 4 ruled, in part:

"... that the Board . . . does not see a *prima facie* case that would warrant enquiring into the Form A-4".

5. My concern at the time, and I believe it to have been justified on the basis of subsequent testimony, was that it was premature to give the A-4 a clean bill of health, when we, the Board, were going to enquire into potentially faulty membership evidence, and membership evidence is the principal reason for having the Form A-4 prepared in the first place.

6. It is apparent that given the confirmed irregularities in the membership evidence, that the declarant could not possibly attest that the documents were signed by the employees indicated on the documents on the basis of his personal knowledge or enquiries he had made.

7. The in-plant organizer, Mr. Smith agreed in his testimony that he did not see employees sign cards except for two (2) out of the twenty-five (25) cards that he signed as a witness, and he

also agreed that he could not swear that the signatures on the cards were those of the employees whose names appeared on the cards.

8. I find therefore that the Form A-4 is clearly faulty and I would dismiss the application on that basis alone.

9. Subsequent to the Form A-4 ruling the Board heard testimony and submissions with respect to the membership evidence.

10. Dealing with the date matter first, we know from the direct unequivocal testimony of Mr. Smith that he reviewed the membership cards at his home and where a date was missing he inserted the then current date. He did this on a number of membership cards - not knowing - again confirmed by Mr. Smith in his testimony - the exact date upon which the employees signed the cards. This is in direct contravention of Rule 48 of the Board's Rules of Procedure dated March 1994 which reads:

48. Membership evidence, evidence of objection and evidence of re-affirmation *must disclose the date upon which each signature was obtained* and must be accompanied by the name of the union, if known.

[emphasis added]

11. With respect to the witnessing of membership cards, Mr. Smith quite candidly, to his credit, testified that by signing the cards as a witness he was confirming that he was witnessing the applicant employee placing his signature on the membership card. Having heard Mr. Smith's testimony which in my view was unequivocal with respect to the witnessing of signatures, I disagree with the majority's characterization of Mr. Smith's evidence. How can the majority decision state in paragraph 10 that Mr. Smith:

"... at no point meant to represent with his signature on the cards that he had actually watched the applicant sign the cards".

while in paragraph 9, the majority decision quotes Mr. Smith's evidence in cross examination which states the exact opposite.

12. While it may be true that it is not a Board requirement that the placing of a signature on a membership card (or other such document) be witnessed by another person, the Board has always taken it to mean that by signing the membership document as a witness the person so signing attests that they in fact saw the applicant for membership sign the card and application.

13. *In Emmanuel Products Limited, supra*, we note in paragraph 10:

"The primary issue in any certification proceeding is the ability of the Board to rely on the documentary evidence filed. *When a union has chosen to provide the certainty of witnessed signatures and signed receipts to bolster the integrity of its evidence and has whether through carelessness or design, misled the Board in that regard*, there may be raised in the Board's mind doubts as to the entire credibility of the applicant's documentary evidence. Having regard to the strict standards of integrity required of such evidence, the Board may, in such circumstances and having regard to all of the evidence, reasonably refuse to attach any probative value whatsoever to any of the cards or to the Form 8 declaration filed in support of the application."

[emphasis added]

14. Irrespective of the inadvertence or inexperience of Mr. Smith, the methods adopted by him in collecting membership evidence were highly irregular and fall far short of the "stringent

standards" the Board has required with respect to such evidence (see paragraph 36 Board file No. 0461-91-R, *Hyundai Auto Canada Inc.*, dated 16 January, 1995 (unreported)).

15. Having failed with respect to my Form A-4 concerns - I believe that a very strong case can be made to either dismiss the application entirely, or at the very least order a representation vote, in view of the severe deficiencies with respect to the dates and signatures on the membership cards.

16. Certainly by ignoring totally the acknowledged deficiencies, with respect to remedy, the majority decision will send out an inappropriate message suggesting a serious relaxation of the Board's heretofore stringent standards with regard to membership evidence.

0268-94-R Teamsters Local Union 938, Applicant v. Knob Hill Farms Limited, Responding Party v. Group of Employees, Objectors

Certification - Evidence - Membership Evidence - Petition - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote under section 9 of the Act - Board earlier directing holding of pre-hearing representation vote over objection of employer - Employer submitting that Board without jurisdiction to conduct vote, count ballots or certify union - Board holding that documentary evidence indicating that employee applies for and accepts membership in trade union satisfies membership requirement in section 9 of the Act - Board further holding that, had it been required to decide the matter, documentary evidence in form of application for membership also satisfying requirement in section 9 - Board distinguishing between letter withdrawing support from union and one revoking union membership - Letters withdrawing support cannot have effect of dropping union's level of membership so as to result in ballots cast in pre-hearing vote not being counted - Board directing that ballots be counted forthwith

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. H. Wightman* and *B. L. Armstrong*.

APPEARANCES: *Marisa Pollock* and *Sam Schouten* for the applicant; *Edward T. McDermott*, *David Bannon* and *Howard Wood* for the responding party; no one appearing on behalf of the objectors.

DECISION OF R. O. MACDOWELL, ALTERNATE CHAIR, AND BOARD MEMBER B. L. ARMSTRONG: March 20, 1995

INTRODUCTION

1. This is an application for certification in which the Board has directed that a "pre-hearing representation vote" be conducted. Certification applications of this kind are governed by section 9 of the Act, which reads as follows:

9.- (1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, *if it appears to the Board* on an examination of the records of the trade union and the records of the

employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in the bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under section 8.

9.1-(1) If a representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast are cast in favour of the trade union.

2. Upon receipt of this particular application, the Board determined that the union had the requisite "appearance" of employee support, and directed that a representation vote should be held. Employees were asked to signify, by secret ballot, whether or not they wished to be represented by the union in a collective bargaining relationship with their employer. The ballot box has been sealed pending resolution of certain legal objections raised by the employer.

3. The employer asserts that the vote should not have been taken, and that the employees' ballots should not be counted. The employer argues that the union did not have sufficient "membership" support to justify taking a representation vote or to warrant counting the ballots.

4. In the employer's submission, the employee documents filed in support of this certification application are mere "applications for membership" in the union, which are insufficient to establish actual "membership" as required by section 9; moreover, some of these employee "applicants" withdrew their support prior to the filing of the application for certification. The employer argues that when these factors are taken into account, the Board cannot be satisfied that the union enjoyed the minimum thirty-five per cent membership support required for a representation vote to be effective under section 9(4) of the Act. The employer argues that the application should therefore be dismissed, without counting the ballots.

5. The union asserts the contrary. The union submits that it has established sufficient employee support to warrant a representation vote being taken, and that its right to certification should turn on the results of that vote. The union urges that the ballots be counted so that the employees' wishes can be ascertained.

6. In order to understand the legal and policy issues raised by this case, it may be useful to sketch in some background.

II

The scheme of the Act - in general

7. The scheme of the Act is quite simple. A trade union can become "certified" as the employees' bargaining agent, when a majority of employees indicate that they want the union to represent them. Support for the union can be demonstrated by documentary evidence, or by a representation vote, or both. Once certified, the union has a "license to bargain" on behalf of all employees in the "bargaining unit", whether or not they are union "members" or supporters. Certification is the first step in the collective bargaining process regulated by the Act.

8. These days, most certification applications are made pursuant to section 8 of the Act, and are based exclusively upon documentary evidence of “membership”. (See generally: section 105(2)(j) and 113(1) of the Act, as well as sections 1(f)(g)(j) and 47 of the Rules). If those documents demonstrate that more than fifty-five per cent of the employees in a bargaining unit (i.e. “a clear majority”) are *members* of the union, *or have applied to become members*, the Board can certify without recourse to a representation vote. Representation votes are a residual mechanism that is used where the union has not established a “clear majority”, or where there is something in the circumstances of the case that persuades the Board to seek the additional confirmation of a secret ballot vote. Section 8 of the Act reads as follows:

8.- (1) *Upon an application for certification, the Board shall ascertain,*

- (a) *the number of employees in the bargaining unit on the certification application date; and*
- (b) *the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.*

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit *are members* of the trade union on the certification application date *or have applied to become members* on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit *are members* of the trade union on the certification application date *or have applied to become members* on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

- 1. Evidence that an employee is a *member* of a trade union, has *applied to become a member* or has *OTHERWISE EXPRESSED A DESIRE TO BE REPRESENTED BY A TRADE UNION*.
- 2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
- 3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4) but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;

- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned, further evidence identifying or substantiating that evidence.

[emphasis added]

9. Section 8 contains a detailed code governing the kind of evidence of employee support or objection that can be put before the Board. However, it is important to appreciate what this evidence is used to demonstrate in the statutory scheme, and, in that regard the phrase “otherwise expressed a desire to be represented” in section 8(4) is significant. That phrase indicates that at least one of the inferences from an employee’s union “membership” or an “application for membership” is that they both indicate a *desire to be represented* by the trade union. That is important for the purpose of certification, because that is what the certification process is designed to test.

10. The “pre-hearing vote” procedure is a little different. As its name suggests, that process involves the taking of a representation vote *before* a formal inquiry into any of the issues which might arise on a certification application (the status of the applicant union, the timeliness of the application, the definition of the bargaining unit, and so on). The purpose of section 9 was discussed by the Board in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters “time is of the essence”; but this is especially the case in respect of representation votes. If the trade union’s certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union’s certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or “quick vote” procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

6. The procedure prescribed by [section 9] differs in some significant ways from the “ordinary” certification process. Upon an application for certification in which the trade union requests a pre-hearing representation vote, the Board need only determine a “voting constituency” - not a “unit of employees appropriate for collective bargaining” as it would under section 6(1) of the Act. Often the voting constituency and the bargaining unit ultimately determined will be the same; but this is not always the case, and it is for this reason that the Board is empowered to seal the ballot box pending a formal hearing. If the parties differ on the “shape” or description of the unit, the Board will direct that the ballots of some, or all, of the voters be segregated, and not counted, pending a resolution of this issue. Similarly, if it is contended that certain individuals are not entitled to vote, their ballots are segregated until their entitlement can be determined. Here, of course, there is no dispute with respect to the bargaining unit. If successful, the applicant union will obtain bargaining rights for the bargaining unit formerly represented by the intervenor.

7. On a pre-hearing vote application the Board does not make an initial *determination* of membership support as it would under [section 8] of the Act. Under [section 8], a representation vote

cannot be ordered unless the Board is *satisfied* that *not less than forty-five per cent* [now forty per cent] of the employees in the *bargaining unit*, are “members” of the trade union. Under [section 9], however, the Board may order a representation vote if it *appears*, on an examination of the records of the trade union and the employer, that not less than thirty-five per cent of the employees in the *voting constituency* were members of the trade union at the time the application was made. The “pre-hearing” vote procedure involves a lower threshold percentage, and an initial onus on the union to establish only an “appearance” of support. [Section 9(4)] of the Act provides that a final determination, with respect to the bargaining unit and the trade union’s actual membership support, can take place *after* the representation vote has been taken. If the Board is satisfied that the trade union has the requisite employee support (not just the appearance of support) then the representation vote has the same effect as if it had been taken under [section 8(2)] of the Act. Again, it must be emphasized that if any contentious issue arises, [section 9(3)] empowers the Board to seal the ballot box until an objecting party has had a full opportunity to present evidence and make submissions at a formal hearing.

[emphasis added]

11. Section 9 is designed to make representation votes more readily available to employees - leaving any legal or policy issues for later litigation.

12. Section 9 is an alternative to section 8, and may be attractive for a variety of reasons. From a union perspective, it is often useful to seek a quick vote of this kind to “clear the air”, and conclusively establish whether the union enjoys majority support. From the employees’ perspective, the representation vote is a familiar means by which they can record their views, free from peer pressure, and comfortable in the knowledge that their individual choices will not be revealed. And from the employer’s point of view, a representation vote may be preferable to the document based assessment of employee wishes contemplated by section 8 - particularly when those documents are not shown to the employer (see section 113 of the Act). Generally, employers prefer representation votes.

13. A pre-hearing vote can provide a quick and conclusive answer to the central question in a certification application: do the employees wish to be represented by a union or not. It would be unfortunate if access to that process were encumbered by unnecessary “technicalities”, since the clear intention of the Legislature is to avoid those problems and get to the heart of the matter: what do employees want.

III

Some History

14. Since the 1950’s a union has demonstrated its right to “automatic certification” without a vote, or its right to have a representation vote conducted, by showing that a certain number of employees were “members” of the union. The percentages have varied over the years, but their purpose has remained the same: unless the union can demonstrate this minimum level of “membership” support, the Board cannot direct a representation vote, and unless the union can show the membership support of a clear majority of employees, the union cannot be certified “automatically” without a vote. “Membership” - that is, *affiliation* to the union *as an organization* - has always been a critical element in the statutory scheme, even though “membership” is being used as a proxy for support for certification of the union.

15. From 1950 until 1970, certification depended upon Board findings with respect to union “membership”; but the statute did not actually contain a definition of the word “membership”. The Act merely gave the Board the general authority to administer the certification sections of the Act and the general power determine the *form* of “membership” evidence, (under what is now section 105(2)(j) of the Act). If the Board was satisfied on the basis of the evidence before it that a

clear majority of the employees were “members” of the union at the prescribed time, the Board could certify “automatically” (i.e. without a vote), much as it does today. If the union’s membership support was significant, but not a “clear majority”, the Board could order a representation vote.

16. But there was no statutory definition of the term union “membership”. The statute did not elaborate on what the word “member” might mean, nor indicate what evidence would be necessary to establish the fact of membership. That was left for the Board to determine in the context of the task that had been assigned to it: the assessment of whether a majority of employees wanted the trade union to represent them in a collective bargaining relationship with a particular employer.

17. We might pause here to note, that although the certification formula has always referred to union “membership”, “membership” in the union is neither legally nor logically connected to the union’s actual role as *statutory bargaining agent*. An individual can be a “member” of one or more unions whether or not a union is that person’s collective bargaining agent vis-a-vis a particular employer; and once the union is certified, it is entitled to represent all employees in the bargaining unit *whether or not they are union members* (see section 69 of the Act). Moreover, once certified, the union remains the bargaining agent for all employees in the bargaining unit regardless of subsequent changes to the composition of the work force, regardless of the ebb and flow of employee support (see the remarks of Laskin C.J.C. in *Terra Nova Motor Inn*, (1975) 75 CLC ¶14,253) and regardless of whether they have become or remain “members”.

18. Even in the statutory scheme the connection between “membership” and “representation” is imperfect - although, of course, certification is the way that a union acquires the right to represent employees. A bare 35-40 per cent membership support can lead to a representation vote, and if the union “wins” the representation vote it becomes the employees’ bargaining agent *even if it never acquires another member, and even if all of its existing “members” depart*. And if the application is under section 8, based on *applications* for membership, a union can be certified even if it has no “members” at all in a common law sense. Finally, it is interesting to note that on a representation vote, the question for employees is “do you want to be *represented*”, not do you wish to be a “member”. (Compare section 58(3) governing the termination of bargaining rights).

19. We might also note that a union is a collective bargaining organization that is not at all like a typical “club” or “voluntary association” (indeed membership is often not really “voluntary” at all - see section 47) and it speaks for people who are not necessarily its members. Its internal rules or constitution have very little to do with its status as *statutory bargaining agent* under the *Labour Relations Act*. The statute does not even require that a union have a constitution, let alone prescribe its contents. Nor does the Act say much about the rights of union *members qua members* (i.e. as opposed to *employees in a bargaining unit* to whom the union owes various statutory duties - see for example section 69).

20. Nevertheless, prior to 1970, “membership” was an important concept *at the certification stage*, because a union demonstrated its right to automatic certification or a representation vote by showing that its employee supporters were union *members*. “Membership” was important because the scheme of the Act made it so. If employees were “members” of the union, it was *assumed* that they supported the union’s bid for certification as the bargaining agent for employees at the workplace. “Membership” was a critical element in the statutory formula or by which the union becomes “certified”.

21. For about 20 years no one challenged the Board’s authority to decide what “membership” was for certification purposes. The Board’s Rules provided that “membership” was to be

determined on the basis of documentary evidence, and the statute provided (reversing a Supreme Court of Canada decision) that “membership” evidence was to remain confidential. However it was the Board that determined what “membership” in the union meant in the context of the statutory scheme, as well as what the union had to put before the Board to establish that an employee was a “member”.

22. A union could always show that an employee was a “*member*” by demonstrating (through documents) that s/he had taken an oath, or had gone through some ritual, or had fulfilled specific qualifications, or had done whatever else might be required under the union constitution to be admitted to “*membership*” in the organization. But this process could be complex or cumbersome, and did not focus directly on what certification was really about: *whether the employee wanted the union to represent him/her in this bargaining unit for this employer* (the question on the ballot in a representation vote, if one is held). Accordingly, between 1950 and 1970 the Board developed the following “mixed test” for determining what “membership” meant in the context of a certification application:

- (1) Had the employee *applied for membership* in the union?
- (2) Had the employee indicated his *acceptance of membership* in the union and his assumption of the future responsibilities of membership, by paying at least one dollar in respect of the prescribed fees or dues?
- (3) Did the constitution of the union contain an express prohibition preventing the employee from being admitted into membership?
- (4) Did the union accord to the employee full rights and privileges as a member?

23. The statute did not expressly say that, of course. The Board developed this approach in order to give policy content to the undefined words in the Act. We have called it a “mixed test” because, as will be seen, the Board’s approach approximates the club/common law concept of “membership”, without embracing it absolutely. For example, the Board held that an “*application for membership*” was sufficient organizational affiliation for certification purposes.

24. If an employee had done the things listed above, the Board considered him/her to be a “member” of the union for the purpose of certification, regardless of what additional rights, obligations, or limitations might be found in the trade union’s constitution. The Board (like the scheme of the Act) was not unduly concerned with the terms of the union constitution. The *Labour Relations Act* does not regulate internal union affairs, and the Board was disinclined to look to such matters when exercising its statutory mandate.

25. A trade union might be a club at common law; but, in the Board’s view, “club law” was not what the Legislature really had in mind when it drafted the *Labour Relations Act* or established the certification process. The Board reasoned that certification was about the union’s status as bargaining agent, not the employees’ rights as a member, and if the employee wanted to join and the union was prepared to accept him/her, that was sufficient *affiliation* to the organizations, and *support* for certification, to count that individual “in the union camp” for certification purposes - regardless of what the union constitution might say. For the purpose of certification, “membership” and an “application for membership” were the same, and a union constitution did not necessarily govern the result. Club law concepts were not abandoned, but they were not controlling either.

26. Over the years, trade union practice became increasingly congruent with this well established Board policy. Unions developed so-called "membership documents" that were used for organizing purposes, and consisted of an *application for membership* and an attached receipt indicating that at least one dollar had been paid in respect of union dues. The approach was well known. Indeed, the Lieutenant Governor in Council actually passed Rules and created forms reflecting this established Board and trade union practice (see for example: the 1952 certification form appearing as Form 2 in Consolidated Regulations of Ontario 1950, Reg. 236 as amended by O. Reg 11/51, 202/51 and 203/51). In effect, trade unions developed a kind of "provisional membership" for certification purposes that was acceptable to the Board and, that was evidenced by an *application for membership* with supporting receipt.

27. Over the years evidence of that kind was accepted in hundreds of certification cases, and provided the basis for automatic certification or representation votes in certification applications involving thousands of employees. There was never any operational significance between "membership" in the union and an "application for membership"; nor was there any practical problem subsequently admitting employees to actual membership if that was their wish (or obligation under a collective agreement). For as we have already noted, "membership" was only relevant at the certification stage because the statute identified this element as a proxy for employee support. Thereafter, the union's statutory role as bargaining agent continues whether or not employees in a bargaining unit ever actually became members or remain "members" in accordance with the union constitution.

28. However, the Board's established approach to defining "membership" was successfully challenged by an employer in *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796 et al*, (1970) 70 CLLC ¶14,008. On the employer's motion the Supreme Court of Canada held that a trade union was like a club, and that in determining what union "membership" meant for certification purposes, the Board could not ignore what the union constitution required. Membership was held to be about "club law" after all - even though the operational connection to the statutory scheme is quite debatable, and the Board had taken a different view for twenty years.

29. It appears that in the Court's opinion, the kind of "membership" that was contemplated by the statute was to be determined solely by reference to the union constitution, not the "tests" that the Board had developed. The Court ruled that when the Board applied its own tests it was "asking itself the wrong question". And from that perspective, there might be a difference between *membership* in the union, and the kind of affiliation to, and support for, the union organization evidenced by a "mere" *application for membership*.

30. The decision in *Metropolitan Life* was issued on January 28, 1970. But the law as declared by the Court did not last very long. Six weeks later, the Legislature amended the *Labour Relations Act* to include the following definition and instruction to the Board:

"member", when used with reference to a trade union, includes a person who

- i) has applied for membership in the trade union, and has paid to the trade union on his own behalf an amount of at least one dollar in respect of initiation fees or monthly dues of the trade union,

and membership has a corresponding meaning.

105.-(4) Where the Board is satisfied that a union has an established practice of admitting, per-

sons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for the eligibility requirements.

31. These amendments reversed the Supreme Court of Canada decision that had been released a few weeks before - implicitly rejecting at least some of the legal theory and reasoning upon which it was based. In effect, the Legislature restored the previous status quo by providing a statutory underpinning for what the Board had been doing all along. The Legislature acted to make sure that the focus in a certification application did not drift from assessing employee support for the union as bargaining agent (what the process was about), into arcane issues of internal club law - issues which were not central to the certification decision but could bog down the whole process.

32. The definition of “membership” provided in response to *Metropolitan Life* ratified the Board’s existing policy, and confirmed that an *application for membership* is a sufficient showing of employee “membership” to support *either* automatic certification, or the taking of a representation vote. In addition, the club or common law test of “membership”, drawing on the union constitution, was not to be determinative. Section 105(4) confirms that the Board should consider the union’s *practice* rather than the eligibility requirements in the constitution. It is custom not constitution which governs. Section 105(4) reflects both the prevailing practice and the labour relations reality: unions routinely organize any receptive employees, without regard to the union’s historical organizational base, and without regard to the eligibility requirements of the union constitution.

33. On the other hand, the Legislature did not totally abandon the “membership” notion that had been pivotal in the Board’s approach both prior to *Metropolitan Life* and afterwards. It did not erase the need for affiliation or connection to the union as an organization, nor did it substitute some notion of “support” or “desire to be represented” of the kind that appears explicitly in the termination provisions of the Act. The Legislature merely extended the concept of “membership” to include an “*application for membership*”, and confirmed that the Board was not necessarily obliged to apply the union’s constitution (see again sections 105(4) and 105(2)(j)).

34. It is not at all clear whether *Metropolitan Life* would be decided in the same way today. What is clear is that the Supreme Court made a binding determination of what certain words in the statute meant, and the Legislature reversed that *result* by changing those words and returning the Board’s focus to what it had always been. The Legislature gave a special meaning to the word “membership”. The Legislature did not jettison the concept of *membership* altogether.

35. And that brings us to the current provisions of the Act, and the changes made by Bill 40 in January 1993.

IV

The Effect of Bill 40

36. Since the 1970 reversal of *Metropolitan Life*, the statute has contained the above-mentioned definition of “membership”. That definition was set out in section 1 of the Act, and was to be applied whenever the word “member” was encountered later on in the statute. Thus, when the Board had to determine whether employees were “members” of the union in a “regular” [now section 8] certification application, it was sufficient if they had *applied for* membership and paid at least one dollar towards any later union dues. One did not have to actually *be* a “member” or become a “member” in accordance with the union constitution, nor did one have to pay the actual dues prescribed in that constitution. A token payment was enough.

37. Similarly, in an application for certification in which a pre-hearing vote request had been made, the term “membership” meant what the statute said it did - and again that *included* someone who had signed a card *applying for membership* and paid at least one dollar towards union dues. The test for “*membership*” was the same for “regular” and “pre-hearing” applications, because, in each case, when the word “*member*” was encountered in the relevant section of the Act, the Board was referred back to the statutory definition.

38. In 1993 Bill 40 changed the statutory format. Instead of having a statutory definition of the word “member” at the beginning of the Act, which is then “plugged in” whenever the word “member” is encountered later on, the legislative draftsman has eliminated the definition altogether, and tried to insert the expanded meaning to the word “membership” in the various places where the word actually appears. Presumably this was done for the purpose of clarity, and in order to make the statute easier to read, without flipping back and forth between definitions at the beginning of the statute and the substantive provisions later on.

39. But the result of this change in *format* may have been a change in the *substantive law* - or so the employer argues in this case.

40. Section 8 reflects that change in legislative format. The words respecting “membership” formerly found in the definition at the beginning of the Act, have now been relocated in the body of section 8 itself, so that the result is much the same as it was before. An *application for membership* is a sufficient showing of support for certification purposes, and the Board does not have to decide whether an employee actually has become a “member” within the meaning of the union constitution. (The requirement for a minimal financial payment has also been eliminated - see section 105(4.1) which, be it noted, still retains the reference to “membership”).

41. Under section 8 of the Act a union can be certified as the employees’ bargaining agent even if *none* of its *supporters* actually are “*members*” of the union, none of them has paid any dues monies to the union, and perhaps even if they are all barred from membership under the union constitution (see section 105(4) of the Act, reproduced above). This is, of course, entirely consistent with the practical and policy considerations that we have discussed above, and which prompted the 1970 reversal of *Metropolitan Life*: “membership” is significant not for institutional or internal trade union reasons, but rather as a proxy for support of a particular bargaining agent in a particular certification application.

42. However, the pre-hearing vote provisions are framed in a different way - or, more accurately, remain exactly the same as they were prior to Bill 40. The definitional words formerly found at the beginning of the Act, did not make their way into section 9, which still reads like this:

9.- (1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were **members of the trade union at the time the application was made**, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not

less than 35 per cent of the employees in the bargaining unit were *members of the trade union at the time the application was made*, the representation vote taken under subsection (2) has the same effect as a representation vote taken under section 8.

43. Under section 9, the Board's power to order a representation vote depends upon an "*appearance*" that 35 per cent of the employees were "members" at the relevant time, just as it did before. The Board's power to act on a representation vote still depends upon a "*finding*" that 35 per cent of the employees were *members* of the union at the relevant time just as it did before. But there is no reference in section 9 to an *application for membership*; and, with the elimination of the statutory definition, there is no explicit statutory direction to read the word "*member*" to include someone who has merely *applied for "membership"*. Thus, even though there has been no practical difference between "members" and "applicants" for almost 50 years, and there is clearly no difference in section 8 of the Act, the employer says that there is, a critical difference in section 9.

44. This result is a little confusing, and quite frankly, anomalous. It may make it more difficult to get a quick and final determination under section 9 - the very purpose of that provision. It raises the mischief that the Legislature moved so swiftly to eliminate in 1970. It may draw the Board into questions of "club law" which really have nothing to do with the certification exercise, and which the Legislature has clearly directed should not be the dominant theme for certification purposes. And it sets up an entirely artificial distinction between the "regular" and "pre-hearing" vote certification procedures, that may discourage resort to the latter - a rather ironic result when one remembers that employers generally prefer representation votes, as opposed to the document focused procedure under section 8.

45. We note, for example, that a vote option is also available under section 8 with a forty per cent threshold based on mere "*applications for membership*". In light of its response to *Metropolitan Life* did the Legislature really want to turn back the clock if the union sought a quick vote under section 9? Did the Legislature really intend a very different enquiry under section 9 that would make votes more difficult, or would shift parties into the more permissive vote provisions in section 8? We do not think so.

46. Section 9 as currently drafted is also difficult to square with the rest of the statutory scheme; for although section 9 refers only to "membership", the statute elsewhere - including the main certification section - gives equal status to an "application for membership". And section 105(4) remains in force. The Legislature has made it clear that it is the union's *custom* not its *constitution* which determines whether an individual can be treated as a "member" of a union for certification purposes, and there is no doubt that for almost 50 years (except for the six week *Metropolitan Life* interlude) unions and the Board have routinely treated an *application for membership* and *membership* as being the same for the purposes of the certification process - regardless of what the union constitution might say. The situation is not at all like it was in 1970 when *Metropolitan Life* was decided.

47. As the tribunal charged with the responsibility of giving effect to purposes and policy of the Act (see section 2.1 concerning employee rights to join and be represented by a union - "membership" is not mentioned) we do not think we can ignore labour relations reality. The distinction between an application for membership and "membership" may well be significant for club law purposes, but the fact is: thousands of certification applications have been granted on the basis of applications for membership, because unions and the Board have never drawn the distinction that the Court did. Whatever its intrinsic merits, that distinction was abolished by statute 23 years ago, bringing the statutory scheme back into line with a prevailing practice that had been in place for 20 years before that.

48. Whether or not the union constitutions actually say so, the fact is, that in the context of a certification application, unions in this province treat “applicants” not as *prospective members* but rather as *provisional members*, and they have done so for decades. And so has the Board. Did the Legislature really intend to ignore or change that for section 9 representation vote purposes? But not for section 8 automatic certification or representation vote purposes?

49. Against that background, if a union considers employee *applicants* to be “members” for certification purposes, is it plausibly open to an *employer* to claim that they are not? To put the matter another way: if as a *matter of fact* (and there is really no doubt about this) trade unions applying for certification make no distinction between “membership” and “applications for membership”, is the Board obliged to do so - particularly given the origins of “the problem” and the Legislature’s efforts to eliminate it? Did the Legislature really intend to resurrect distinctions it so quickly eliminated 25 years ago?

50. If pressed to decide this case purely as a matter of Legislative policy, we would conclude that the elimination of the definition of “member” from the statute and from section 9 in 1993 has not turned the clock back to 1970. Prior to 1970, the Act did not expressly contemplate the Board acting on an *application for membership* in any context, and the Act did not expressly relieve the Board of any obligation to follow a union’s constitution. Nor did the statute so clearly indicate why membership was relevant, or what its significance was, for certification purposes. The current statute does all of those things - despite *Metropolitan Life* - and in our view, one cannot ignore 50 years of history, in which unions have treated *applicants* as *members* for certification purposes. Nor can one ignore the legislative history of the certification sections.

51. Despite the creative efforts of counsel for the employer in this case, we are unable to discern any policy basis for the change to section 9 that has been enacted (or to put it more accurately, the failure to change section 9 in tandem with section 8). Nor was there any discussion about it in the long debate preceding the passage of Bill 40. Indeed, we are satisfied that there was no legislative intention to change section 9 in this way.

52. Rather, we think that the current difference between section 8 and section 9 reflects an oversight on the part of the legislative draftsman. It is a simple drafting error: an effort to make the statute easier to read may have resulted in a quite unintended change in the symmetry and thrust of the pre-hearing vote process - a change that may blunt the remedial thrust of section 9, and raise issues which the Legislature moved so quickly to avoid about 25 years ago.

53. Does the Board have the jurisdiction to simply “rectify” the situation - to “read in”, as it were, words that are not there (but should be) in order to avoid consequences that the Legislature clearly did not intend? It is not at all clear that we do; but before even considering that possibility, one must decide whether it is necessary. And that means reading the statute *as a whole*, in light of existing labour relations policy, obvious Legislative choices, and indisputable labour relations facts.

54. When one analyzes the statute in this way, it is evident that while the Legislature has not severed the linkage to the notion of “membership”, it had no intention of making any distinction between “members” and “applications for membership” in section 9. The “club law” approach of *Metropolitan Life* has not been resurrected. And quite apart from what the Legislature may have had in mind (or overlooked), trade unions themselves do not *in fact* draw the legal distinction that the Court did in *Metropolitan Life*.

55. Trade unions *in fact* routinely treat applicants as “members” for certification purposes; and we can discern no practical or policy reason why the Board should do otherwise, or should

introduce a distinction that the union itself does not make. In the context of an organizing campaign that is to culminate in an application to the Board “applicants” for membership are considered to be provisional “members”. In our view an “*application for membership*” should be treated as a sufficient indication of affiliation or attachment to “count” as “membership” within the meaning and for the purposes of the certification process - at least under section 9 where there is the confirmatory evidence of a secret ballot vote.

56. Is recognizing this fact amending the statute “by the back door”? We don’t think so. It is recognizing a labour relations reality - as we think the Board is obligated to do if it is to fulfil its statutory mandate and carry out the legislative purpose. And section 105(4) suggests a statutory basis for doing just that.

57. Trade unions typically have *constitutions* that regulate their affairs (although the *statute* does not expressly require it), however section 105(4) indicates that the employee organization will also have *customs* which govern its *actual* operation and may be contrary to its formal constitution. *Section 105(4) is a warning that when examining the union organization for statutory purposes, the Board should look to how it actually operates*, whether or not those practices are in accordance with the terms of some written constitution. If it is custom that determines the union’s rules or approach to membership, then it is custom that governs - something that is hardly a novel idea in a legal system with parliamentary underpinnings and English roots. The union organization involves more than the constitutional contract among its members - or to put it more accurately: the union may have written and unwritten conventions which govern the way in which the organization operates, and such conventions may include who are “members” for certification purposes.

58. Whether written in their constitutions or not, unions in this province treat “members” and “applications for membership” as the same for certification purposes. No doubt they do that because of the history to which we have referred. For 50 years, the Board and the Legislature had told them they could. But the fact is: unions treat “applicants” as “members”. Thus, if the Board is required to look to the statutory purpose (which is to measure *support*) to the statutory history discussed above, and to the way in which the union organization actually operates, one finds no support for the distinction urged upon us by the employer and seemingly supported by *Metropolitan Life*.

59. What would that mean for this case? Only that union practice and legislative intent are *ad idem*: there is no distinction in fact *and for certification purposes* under section 9 of the *Labour Relations Act* between *members* and *applicants* for membership even though one might so argue based upon the literal wording of section 9 standing alone. In both cases, the individual has signified an intention to connect himself/herself to the union organization, either by becoming a member or applying to do so; and if enough employees do that, the Board will hold a vote to give all employees a chance to make their choice.

60. For all of these reasons, if we were required to find that membership and applications for membership are the same for the purpose of section 9 we would unhesitatingly do so. Those concepts are differentiated for historical reasons, but unions do not make that distinction in the context of certification and we do not think that we should do so either. If unions regard “applicants” as “members” for certification purposes we think the Board should do so as well. If the “right question” is: are “applicants for membership” to be considered “members” for the purposes of certification under section 9, the “right answer” is: yes. There is and should be no distinction between section 8 and section 9 in this regard.

61. However, we do not have to reach any final conclusion in this regard, because the employees in this case are not just “applicants for membership”.

V

Does the particular documentary evidence filed by the union establish that employees are “members” of the union? Or are they merely “applications for membership?”

62. In support of this application for certification, the trade union filed documentary evidence on behalf of just over 35 per cent of the employees in the voting constituency (which, in this case is also the “unit of employees appropriate for collective bargaining”). This documentary evidence is in the form of cards which were filed in a timely way and are supported by a properly completed Form A-4, Statutory Declaration signed by Sam Schouten a union official. That statutory declaration reads, in part, as follows:

I Sam Schouten, the organizer of the applicant declare that, to the best of my knowledge, information and belief: *the documents submitted in support of the application represent documentary evidence of membership* on behalf of 57 persons who are employees of the responding party in the bargaining unit that the applicant claims to be appropriate for collective bargaining, on the date of the making of the application . . .

[emphasis added]

The declaration confirms that, from the union’s perspective, the employees who signed these cards are “members” for the purposes of this certification application.

63. In each case the so-called “membership document” is signed by the employee, and is countersigned by the individual soliciting the card on behalf of the union. This is what the cards say:

TEAMSTERS’ LOCAL UNION 938
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Social Insurance No.

APPLICATION FOR MEMBERSHIP

NAME (Please print) Date (4/4) 198 (94)

ADDRESS (Please print)

TOWN (Please print) POSTAL CODE

OCCUPATION

HOME TELEPHONE

COMPANY (Knob Hill Farms)

COMPANY ADDRESS (Dixie Rd.) EMPLOYMENT DATE

\$ 0 Initiation Fee received by I confirm the payment of the Initiation Fee

X

(Member’s Signature)

I hereby authorize and accept membership in Teamsters Local Union 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and promise to abide by the International Constitution and the Local By Laws. I further authorize the Union to represent me in any negotiations with my employer, concerning wages, hours and other working conditions. If I am found to be a dependent contractor, I agree to be included in a bargaining unit with other employees.

[emphasis added]

64. The opening words of each membership document, standing alone, might suggest that it is merely “an application for membership”. However, when the document is read as a whole, it becomes clear that it is *also*:

- (a) an authorization and *acceptance of membership*,
- (b) a *promise to be bound* by the union constitution,
- (c) an *authorization* for the union to *represent* the individual in any negotiations with the employer [Knob Hill Farms], and
- (d) an agreement that if the employee is found to be a dependent contractor, s/he may be included in a bargaining unit with other employees (see section 6(5) of the Act).

65. If a trade union is an organization of employees formed for purposes that include collective bargaining (the statutory definition), and if an employee becomes a “member” of the trade union by binding himself/herself to the union organization and its objectives, we find that the employees who signed these particular documents have done what is necessary to become “members” for the purposes of certification within the meaning of the Act. *In addition*, these employees have authorized the union to represent them in negotiations with their employer (what certification is about), and have provided information which the Board could act upon if it were required to fashion a bargaining unit under section 6(5) of the Act.

66. There is no doubt that the applicant is a trade union within the meaning of the Act. There is no evidence that the union does not admit this kind of employee into membership. There is no evidence (or argument) that there is any constitutional impediment to membership.

67. The A-4 declaration filed in support of the application describes the cards as documentary evidence of *membership* - not mere applications for membership - and there is no evidence that any of these individuals has been *refused* membership. On the contrary. The document itself indicates that the employees were offered membership by the individual who approached them on behalf of the union, that they authorized and accepted membership, that they bound themselves to the union constitution, and that they “further” authorized the union to represent them. The A-4 document signed by a union official purports to confirm that they are “members”. And, as we have outlined above, union practice (consistent with the statutory history) generally does not distinguish between the two.

68. We find that the individuals who signed these documents became “members” of the applicant union within the meaning of section 9 of the Act.

VI

Does it matter that some employees may have changed their minds after signing the union cards and have withdrawn their "support"? Were they still "members" at the time the application was made?

69. In addition to the documents described above, the Board had before it nine letters from employees. Those letters were submitted to the Board in respect of an *earlier* certification application filed by the union, that was subsequently withdrawn. These documents were transferred from the old file to the present one, *at the request of the employer*.

70. The employer submits that if these letters come from employees who signed union *membership* cards, and if they were written after the *membership* document was signed, and if the letter constitutes a *revocation* or *resignation* or *cancellation* of *membership*, and if the resignation (etc.) is voluntary, then the union's level of *membership support* would fall below the 35 per cent requirement set out in sections 9(2) and 9(4) of the Act.

71. The employer submits that "membership" in a union (a so-called voluntary association) can be revoked; and that that is what has happened in the case of the nine individuals who wrote letters. In the employer's submission, those letters "cancel" the union's membership documents and mean that:

- (a) a representation vote should never have been ordered in the first place; and
- (b) the ballots cast by employees should not be counted.

The employer requests the Board to dismiss the application without counting the ballots or considering the wishes of employees recorded in that secret ballot vote.

* * *

72. The letters are addressed *to the Labour Relations Board*. They are typed, dated, and read as follows:

To whom it may concern,

I, _____, currently work for Knob Hill Farms Limited, located on the Dixie Value Mall, 1250 South Service Road, in the City of Mississauga. I initially signed the card supporting Teamsters Union, Local 938. However, after careful analysis of matters presented to myself, I no longer support them. Therefore, I wish to withdraw my support of the Union.

73. The union asserts that whatever these documents may signify, they do not "cast doubt" on its "membership" evidence; and, in any event, they should not be received or relied upon because:

- (a) With one exception the documents were filed in respect of an earlier certification application that was withdrawn, not the present certification application.
- (b) The letters have been directed to the Board's attention *in this application by the employer, not the employees writing them* (i.e. no employee in this one has indicated that s/he wishes to have the earlier objection resurrected).

- (c) The letters constitute the kind of evidence which the Board may receive in a regular certification application because section 8(4) so provides, but, in the union's submissions such documents cannot be received in connection with a pre-hearing application under section 9 because section 9 has no equivalent to section 8(4); moreover the Board has the power to reject or disregard such documents where there will be a vote anyway.
- (d) The documents are not proven to be a voluntary expression of the wishes of the employees who signed them (the union refers to Rule 50).

74. The union also points out that these very employees have already had an opportunity to express their wishes in a secret ballot vote. Unlike the employer, the letter writers do not take the position that the workers' wishes should be disregarded. There is no indication that they either oppose the vote, or object to the ballots (including their own) being counted. But that is the use that the employer seeks to make of their letters.

75. The employer replies that there may be no representations from employees, one way or the other, because they have received no specific notice of the hearing. However, that is not entirely accurate. The one employee who filed his letter *in this application* did get notice of the hearing; and, after the vote, a notice in Form B-37 was posted in the workplace inviting employee representations. None were forthcoming from any employee. No employee objects to the taking of the vote or to counting the ballots.

VII

76. When sections 8 and 9 are read together, in light of the statutory scheme and purpose, it seems clear to us that "change of heart" documents of the kind now before us have no place in the pre-hearing vote process. Unlike section 8, section 9 makes no provision for the Board receiving such material, and in our view that "omission" is intentional. It is useful, though, to look at how section 8 treats such documents, because as we have already noted, sections 8 and 9 are both about certification and are, to some extent, alternative procedures.

77. Under section 8 a union can be certified solely on the basis of documentary evidence of membership. On the other hand, the Legislature has provided under section 8 that employees may register a change of heart in various ways, and if they do so in a timely manner, the Board will take that into account. But it is interesting to note *how* the Board is instructed to treat a "change of heart" - and the legal categories which the Legislature has established to deal with such matters.

78. Section 8(4) item 2 and 8(4) item 3 categorize the various kinds of documents which the board can receive with respect to employee wishes. Some of those documents have to do with "membership". Others have to do with *support* or *objection* which, as we have already noted, is *different* from membership notions (albeit both are involved in the certification determination).

79. Under section 8, documents of objection are all treated in the same way: they go to the Board's discretion to order a representation vote. In this regard there is no operational distinction between a "revocation of membership" a statement of objection to representation, or a withdrawal of "support". If the union's *support* seems equivocal based upon the documentary evidence of "membership", the Board settles the matter by ordering a representation vote (see section 8(6)). The Board does that even if the persons affected by the application remain "*members*" in both a

common law and statutory sense. If the “members” are of two minds about supporting the union, the Board orders a vote to resolve the issue.

80. There is no equivalent process under section 9, and in our view that is deliberate. None is necessary because the process contemplates a representation vote *in any event*. There is no place for “change of heart” documents in a section 9 case because all of the employees - including the indecisive ones - will have the opportunity to record their preference in a Board supervised secret ballot vote.

81. We see no purpose for this kind of employee representation in a section 9 proceeding where, as noted, documents of this kind are not contemplated and all of the employees will have an opportunity to express their wishes. If the Legislature had intended change of heart documents in a section 9 proceeding it would have said so, as it did in section 8. But it did not. Accordingly, if the Board has the power under section 105(2)(j) to accept documents in this form in a section 9 context, we would decline to do so.

82. However, even if we are wrong in this regard, we do not think that *these particular documents* command the result that the employer urges: that the ballots should not be counted and the employee wishes thus disregarded.

VIII

83. On this branch of this decision, we are prepared to assume, without finding, that the *employee* letters are properly before us at this time, that the *employer* can rely upon them, that they are permissible in a section 9 context, and that they represent the voluntary wishes of those who signed them, at the time that they signed them. The question then becomes: what effect should be given to these documents - given that under the Rules, the Board would be precluded from receiving “oral evidence of membership, oral evidence objection or oral evidence of reaffirmation, except to identify or substantiate the [documentary evidence]”.

84. In addressing that issue (in the alternative and within the limits described above), we think that it is useful to consider sections 8 and 105 of the Act - both of which give some guidance about the way in which *the Legislature* has categorized the various kinds of representation which may be put before the Board in documentary form. For when one does that, one finds confirmation of the distinction to which we have referred in the first part of this decision: some kind of membership affiliation (albeit attenuated) is an important concept in the statutory scheme and it is analytically *different* from mere “*support*” for the union or for the certification application.

85. Whether or not there is a distinction between “*membership*” documents and “*application for membership*” documents, the statute indicates that these are not the only kinds of employee representation which may be put before the Board by means of documents. The Legislature has identified other documents which signify other things. And if the Legislature has identified different kinds of documents, and used different words to describe them, we should not lightly conclude that they are all the same - even if the statute then goes on to say that they may all lead to the same result (a vote).

86. Sections 8 and 105 of the Act suggest that a document filed with the Board may be one or more of:

- (1) evidence that an employee *is a member* of a trade union;
- (2) evidence that an employee has *applied* to be a member;

- (3) evidence of a *desire to be represented* by a trade union;
- (4) evidence that an employee who has become a member has subsequently *cancelled, revoked, or resigned from membership*;
- (5) evidence that an employee who has applied to become a member, has subsequently cancelled or revoked the application;
- (6) evidence that an employee has expressed a *desire not to be represented* by a union;
- (7) evidence that an employee who had previously become or applied to become a member but has subsequently had a change of heart has changed his or her mind once more by becoming a member again, by *re-applying for membership* or by otherwise expressing a *desire to be represented* by a trade union.

87. Section 9 speaks only of “membership”; and for the reasons already given, we think that the only reason there may now be an arguable distinction between “membership” and an “application for membership” is a drafting error. It is clear that the Legislature has elsewhere tried to erase any statutory difference in effect, and unions do not make this particular distinction in the context of a certification application.

88. But, by the same token, if one reads the words of the statute literally, as the employer urges us to do, there is also a distinction between a *resignation from membership*, an expression of *opposition* to the union, and a *withdrawal of “support”* for the union, made in the context of a particular certification application. If the Legislature has created these different categories, they must signify something different.

89. Again, the union documents filed in the instant matter are a case in point. They include five separate (albeit related) elements: an application for membership; an authorization and acceptance of membership; a promise to be bound by the union constitution; an authorization to represent the individual in negotiations; and instruction to the Board respecting the configuration of the bargaining unit.

* * *

90. When the words of the employee letters are carefully considered and the Legislature’s categories applied, we are not prepared to conclude that a “withdrawal of support” from the trade union is the same as a “resignation” or “cancellation” of membership. If we read the statute in accordance with its terms, the Legislature has distinguished these types of employee representation. They are different things; and if we are obliged to consider documents such as this at all, we think that we should do so with the statutory categories in mind. In that light, a withdrawal of *support* is not a *resignation from membership*. It has no effect on “membership” at all.

91. This may seem unduly “technical” at first glance; but as we have already discussed, “membership” in the union - the contractual binding of oneself to the union organization - is different from *support* for the union, in respect of a particular certification application.

92. The Supreme Court seems to say in *Metropolitan Life*: it is not enough to support the union, or apply for membership, or want to be a member; one must actually *be* a member in accordance with the union constitution. The Legislature rejected the specific result in that case, but it

preserved the concept of “membership” which was, and remains, distinguished from the notion of employee *support*.

93. Is the distinction between “membership” and “support” odd, or counterintuitive? Not at all. It seems clear that, as a factual matter, an individual may well be a *member* of the union but not wish to be represented by that union in a particular collective bargaining relationship with a particular employer. Indeed, in the Board’s experience, it is not at all unusual for an individual to be a *member* of more than one trade union, so that s/he may have to decide which union s/he wishes to support in a certification application. A member at one time, may change his/her mind later without withdrawing from membership. Conversely, an individual may *support* or *oppose* a union’s bid for certification regardless of whether s/he is a *member* - for example, when given that opportunity in a representation vote which canvasses “support”. There is a real distinction between *membership* and *support* - as unions sometimes learn to their chagrin when their “members” vote “no” in a representation vote.

94. That is why it is the Board’s longstanding practice under section 8 to order a representation vote where it is shown that persons who have applied to become, or are, “members”, have subsequently had a change of heart about their *support* for the union’s certification, even if the change of heart does not take the form of a “resignation”. Bill 40 does not change that practice either. If employees appear to be of two minds, the Board orders a vote to allow them to make their choice by secret ballot.

95. In our view, “membership” in a trade union organization is different from *support* for it, either generally, or in the context of a particular certification application. That withdrawal of support may take the form of a cancellation of membership (although under section 8 it would not make any difference how the change of heart was framed). But the Board will not readily conclude that an employee has “resigned from” or “revoked” his/her *membership* unless the document clearly says so - particularly when the result may be to prevent those and other employees from registering their wishes in a secret ballot vote. (And, if the Board really is required to take a “club law” approach to these matters, it is difficult to see how one could “resign” from “the club” by writing to some third party (the Board)).

96. It would have been relatively easy for an employee in the instant case to resign from, cancel, or revoke his/her membership; and if s/he had done so, the Board might well have had to consider the effect under section 9, when a vote had already been taken, and the whole purpose of that vote was to give all employees - including the wavering ones - the option of reconsidering their support for the union. But that is not what these employees have done here. They have not revoked, cancelled, or resigned from membership. They have, at most, purportedly withdrawn their “support”.

97. For the foregoing reasons, even if we were to make the various assumptions recorded above, and even if we were to find a place for objections of this kind in the vote - based process of section 9, we would not find that these letters withdrawing support for the union either stand in the way of the initial direction that a representation vote should be taken to test employee wishes, or now preclude the Board from counting the ballots. They do not alter the union’s “membership” level. At best, they demonstrate precisely the kind of equivocation that should be addressed by giving the employees the opportunity to express their wishes in a secret ballot vote - which is what has happened here in any event.

98. In view of the length of this discussion, a summary paragraph may be in order:

(1) Despite the drafting error in section 9, we do not think there is a dis-

inction between “membership” and an “application for membership”; and when the statute is read as a whole and in context, we would be inclined to find that under section 9, an application for membership is “membership” of at least a provisional kind, that will support directing and counting a representation vote.

- (2) If we are wrong, the particular documents in this case do establish actual “membership” for the purposes of section 9.
- (3) Change of heart documents probably have no place in the pre-hearing vote process; but even if they do, a “withdrawal of *support*” addressed to the Board is not a revocation or resignation of *membership* in the union, and does not alter the number of union “members” at the relevant time.

IX

Decision

99. The Board finds that the applicant is a trade union within the meaning of the Act.

100. Having regard to the material before it, the Board finds that the unit of employees appropriate for collective bargaining should be framed as follows:

all employees of Knob Hill Farms Limited, at 1250 South Service Road, Mississauga, save and except assistant store managers, persons above the rank of assistant store manager, and office and clerical staff.

102. On the basis of the totality of the documentary evidence before it, the Board finds that not less than thirty-five per cent of the employees, in the bargaining unit were members of the trade union at the time the application was made. We give no weight to the letters withdrawing “support”.

103. Section 9.1(1) of the Act reads as follows:

9.1-(1) If a representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast are cast in favour of the trade union.

104. The Board directs that the ballot box be opened and the ballots counted.

105. If more than fifty per cent of the ballots cast are cast in favour of the trade union, it will be entitled to certification pursuant to section 9.1(1) of the Act.

106. In addition, section 105(2)(i) reads:

105.-(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;

Accordingly, if fewer than fifty per cent of the ballots cast are cast in favour of the union, this certification application will be dismissed, and the Board will receive the parties' representations as to whether it should follow its usual practice of applying a six-month bar to any new application.

107. The Board directs that the ballots be counted forthwith.

DECISION OF BOARD MEMBER W. H. WIGHTMAN; March 20, 1995

1. I have no doubt that, in writing for the majority, the Alternate Chair of the Board has arrived at a conclusion which the Legislature may have, indeed probably did, intend. I have the greatest admiration for the customary clarity with which he puts the issue into its proper historical context and proceeds to advance compelling reasons for there being as few barriers as possible to those seeking to determine the true wishes of employees as to whether they wish to be represented by a given union by means of a pre-hearing vote.

2. Nevertheless, words have meaning, and both the words and meaning of section 9 are clear.

3. If the Legislature does not like the meaning of section 9 it can change the words.

4. The Board should not attempt to change the meaning of the words and in attempting to do so I feel the majority have left this decision open to review

3248-94-R Service Employees International Union Local 532 affiliated with the A.F. of L., C.I.O., C.L.C., Applicant v. Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services Ltd., and Meadowcroft Limited Partnership c.o.b. as **Meadowcroft Place (Guelph)**, Responding Party

Bargaining Unit - Certification - Union applying to represent employees of retirement home in Guelph - Employer submitting that bargaining unit should include group of "floating" maintenance and housekeeping workers, who work out of head office and who service some 25 retirement homes owned by employer, when those maintenance employees work at Guelph home - Board determining that maintenance and housekeeping employees who float to different homes should not be included in bargaining unit - Certificate issuing

BEFORE: *Judith McCormack*, Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Luiza Monteiro*, *Ron Roscoe* and *Andrew Mackenzie* for the applicant; *Wesley Emerson*, *Yvonna Bushell* and *Sonja Altshul* for the responding party.

DECISION OF THE BOARD; March 30, 1995

1. This is an application for certification involving employees who work at the responding party's 60-bed retirement home in Guelph, Ontario.

2. On the agreement of the parties, the name of the responding party is amended to read: "Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services

Ltd., and Meadowcroft Limited Partnership c.o.b. as Meadowcroft Place (Guelph)". Counsel for the responding party acknowledged that these companies were related employers within the meaning of section 1(4) of the *Labour Relations Act*.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. The parties were in dispute in regard to the parameters of the appropriate bargaining unit in this matter. The essence of that dispute involves whether fifty "floating" employees should be included in the bargaining unit. Neither party chose to call evidence. As a result, we relied upon those of their respective assertions which were not contested in coming to our conclusions. Our decision in this matter was given orally at the hearing, and we now provide our reasons.

5. The responding party owns or manages some twenty-five retirement facilities in Ontario. The retirement home involved in this case is Meadowcroft Place (Guelph) which employs twenty-five individuals based at the home itself. There is no dispute that the appropriate bargaining unit should be focused on this specific home, and that these twenty-five employees should be included in that unit.

6. However, there are also approximately fifty other full-time and part-time employees who service all twenty-five homes, including this one, from other locations. Approximately 80% of these fifty employees are maintenance employees, with the remainder performing housekeeping functions. They are assigned by one of two head offices of the responding party through a system where they are called at their personal residences and sent to the particular retirement home which is their next assignment. Maintenance employees do painting, cleaning, minor repairs, and floor-stripping. There is also one maintenance employee who works only at Meadowcroft Place (Guelph).

7. The two head offices of the responding party employ eighteen other people who perform such functions as payroll, accounting, clerical, and billing for the twenty-five homes. In addition, there are marketing consultants who may be assigned to some of the homes, although the individual home administrator plays a role in marketing as well.

8. A floating maintenance person may work at Meadowcroft Place (Guelph) for up to 50 hours in a two week period, depending on the nature of the assignment. At the other end of the spectrum, there are a number of maintenance employees who have never worked at this home. More typically, a floating employee might work four hours a month at this home. Assignments depend on the work to be done and the skills of the employee involved. Although employees are assigned and disciplined by individuals in the responding party's head office, the parties were in dispute with respect to whether they were supervised by the head office or the individual home in which they were working that day. They receive the same paycheque regardless of which home they have been assigned to during the week, but the cost is charged to the account of the individual home within the responding party's organization.

9. The responding party's position was that the fifty employees who service all the homes should be considered as part of the bargaining unit of this home. Counsel acknowledged that the responding party had taken the position that these same employees were part of the bargaining unit in certification proceedings involving at least one other home and possibly two. His view was that those of the floating employees working at this home on the date of application or within the Board's 30/30 period should be included for the purposes of assessing the level of membership support under section 8 of the Act. Ultimately, however, all maintenance employees would be included in the bargaining unit, but only when working at this home. If they were working at

another home, they would be included in that unit for the day or portion thereof, or in no bargaining unit if the other home was not organized.

10. Counsel asserted that since maintenance employees did floor-stripping, if they were not in the same bargaining unit with employees based at the home who did cleaning, there was some potential for a jurisdictional dispute. He also suggested there was the possibility that a maintenance person might walk a resident down the hall, and that this might result in a jurisdictional dispute as well. Counsel argued as well that not including floating employees in this home's unit could lead to increased work stoppages because there would be at least two bargaining units instead of one, and the home had not yet been declared a hospital for the purposes of the *Hospital Labour Disputes Arbitration Act* which prohibits work stoppages. In his view, including these employees in the unit of each specific home would not run counter to the Board's policy of structuring units so that employees would only be in one bargaining unit at a time because different employers would be involved. In this regard, he noted that one of the three entities making up the responding party would be different for a number of the homes, although he acknowledged that the make-up of the employer would also be the same for a number of them as well. In support of his arguments, counsel referred the Board to *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010.

11. The union's view was that these employees should be included in a bargaining unit of their own along with the other head office employees who service all the homes. In particular, counsel objected to the responding party adding these employees to the lists of employees for each home as applications for certification were filed, suggesting that it was padding the lists for the purposes of defeating the certification applications. Counsel noted that if these employees were included in the bargaining units at each home, it would force the union to organize on a province-wide basis, because it would never know which of these employees might be working at a particular home on the date of application. This would defeat the purpose of allowing the union to organize homes individually. It would also mean that the floating employees could be members of up to twenty-five different bargaining units simultaneously. In support of the proposition that the Board does not structure bargaining units which will result in employees being members of more than one bargaining unit at the same time, the union cited *Western Inventory Services Ltd.* (unreported), Board File 1094-89-R, decision released October 6, 1989. In counsel's view, these employees did not have sufficient attachment to the Guelph home to be included within its bargaining unit. The union also disputed that these individuals were at work on the date of application or encompassed by the Board's 30/30 rule. Among other things, counsel argued that the responding party's assertion that there were eight floating maintenance employees at the Guelph home on the date of application was not credible given the size of the home. She noted that including the floating employees in the unit would mean that employees who rarely or never work at the Guelph home would be included in its bargaining unit. The union also pointed out that the potential for jurisdictional disputes was no greater than those that might arise as a result of the responding party's proposed structure. In addition, counsel argued that it would be very difficult if not impossible to administer a collective agreement for employees floating in and out of the bargaining unit.

12. The Board's approach to determining bargaining units has evolved over the course of fifty years of jurisprudence. As a starting point, section 6 of the *Labour Relations Act* invests the Board with a broad discretion to "determine the unit of employees that is appropriate for collective bargaining". Based on long experience, the Board has acknowledged the elasticity of the concept of the appropriate bargaining unit. Rather than seeking to ascertain the one perfect bargaining unit in each situation, it has recognized that there may be more than one equally appropriate bargaining unit in a particular case. In *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board noted as follows:

The Board has long recognized that the structure and appropriateness of a bargaining unit cannot be determined with scientific precision. In any given situation there may not be only one uniquely appropriate bargaining unit. Quite the contrary. As we have already noted, the institution of collective bargaining has shown itself capable of accommodating a variety of bargaining structures, even in broadly similar circumstances, and in particular situations there may be several alternative and equally appropriate ways of framing the bargaining unit description. There may be varying degrees of "appropriateness", with one or more unit descriptions being appropriate, even though some other (usually more comprehensive) bargaining unit might also be appropriate. For example, a single plant unit may be appropriate but so may a multi-plant unit. Full-time and part-time employees can be segregated, but there are many situations where they have not been. This reality was discussed in the *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430, in a long passage to which we might usefully refer, and which also contains a review of the mechanics of the certification process:

14. The Board has a wide discretion pursuant to section 6(1) of the *Labour Relations Act* in determining what is appropriate in the facts of each case. Also section 1(1)(a) [now section 1(1)(b)] provides:

"bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.

Section 6(1) requires that an appropriate bargaining unit shall consist of more than one employee. In addition section [6(3)] which is concerned with craft units requires that in certain circumstances a group of employees shall be deemed to be appropriate and further section [119(1)] makes special provisions for determining an appropriate bargaining unit in construction industry situations.

15. It is apparent that section [1(1)(b)] contemplates that an individual employer may employ persons who can be subdivided into more than one appropriate bargaining unit. It has therefore been common for a single employer to be certified for a number of appropriate bargaining units, e.g. office unit, craft unit, plant unit, sales unit, part-time unit. We emphasize the capacity for more than one appropriate bargaining unit to exist with respect to a single employer, a capacity which is statutorily confirmed by section [1(1)(b)], because from time to time persons have argued before this Board that the use of the definite article in section 6(1), i.e.

"The Board shall determine *the* unit of employees that is appropriate for collective bargaining"

means that there is only one appropriate bargaining unit in each case.

16. It is also helpful to review the process of determining the appropriate bargaining unit. In each particular application the applicant trade union is required to provide a "detailed description of employees of the respondent that the applicant claims to be appropriate for collective bargaining" . . . The respondent employer is by way of reply, entitled to provide a detailed description of the unit claimed by the respondent to be appropriate for collective bargaining . . . A respondent employer is further directed . . . "If, in your reply, you propose a bargaining unit different from the one proposed by the applicant, you shall indicate on the list of employees referred to in paragraph 7 the name and classification of any person you propose should be excluded from, as well as the name and classification of any person you propose should be added to, the bargaining unit proposed by the applicant". Accordingly, in any single application, the applicant trade union and respondent employer may make submissions that agree or disagree on all or some of the various factors concerning the appropriate bargaining unit. Where the parties disagree it is the function of the board to decide which, if any, or part of the contending positions is proper. For example the Board in an individual application may exclude certain persons as being managerial while including others; again groups of employees may be included or excluded from bargaining units depending upon whether they share a community of interest with other employees. See e.g. *Wakefield Lighting Limited* 1965 May OLRB Mthly. Rep.

143 (plant clerical staff); *Sherman Mine, Cliffs of Canada, Limited* July 3, 1969 Board File No. 15604-68-R (laboratory employees); *Affiliated Medical Products Limited* January 9, 1969 (quality control laboratory technicians). In other situations the Board may be required to exclude persons because of a statutory prohibition. See e.g. *The Corporation of the City of Cornwall* June 3, 1969 Board File No. 16166-69-R (police employees). The Board's process is a fact finding one resulting in inclusions, exclusions, accretions and deletions to the proposed bargaining units.

17. After sifting the various facts the board must determine "the unit of employees" that is appropriate having regard to the particular situation then before the Board. The only fetters on the Board's discretion to make a determination are the requirements contained in section 6(1) that the "unit shall consist of more than one employee", *Albert Fuel Limited*, 1969 October 3, Board File No. 16685-69-R, and that the unit of employees is appropriate for collective bargaining - there are no other requirements. The unit that is appropriate is the unit that emerges after all the facts have been considered.

18. The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, 1969 January OLRB Mthly. Rep. 1016.

19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the *Labour Relations Act*. The National Labor Relations Board in the United States has recognized in certain cases that its determination of appropriate bargaining units has "operated to impede the exercise by employees . . . of their rights of self-organization . . ." *Save-on-Drugs Inc.* 138 NLRB 1032 (1961); see also *Quaker City Life Ins. Co.*, 134 NLRB 960 (1961). While great weight must be given to prior cases dealing with similar situations, those cases are not dispositive of the issue in any given case. Bargaining unit determination requires a case by case review of the facts and this is compelled by the working of section 6(1) which provides that the Board "Upon an application . . . shall determine the unit of employees that is appropriate for collective bargaining . . .".

20. It is readily apparent why plant units, or office and sales units are appropriate as a subdivision of an employee unit. There are, however, cases where the lines of demarcation are not so readily apparent and that is particularly so in areas apart from private industry. For example, in the *Canadian Union of Public Employees v. The Governors of the University of Toronto* February 1969 OLRB Mthly. Rep. 1149; June 1969 OLRB Mthly. Rep. 334, the applicant proposed a bargaining unit for all non-professional employees of the respondent in those libraries that fall within the jurisdiction of the University of Toronto Library while the respondent submitted that the appropriate bargaining unit was one encompassing all non-academic employees of the University of Toronto. The Board concluded that the non-academic or non-professional employees of the University Library was an appropriate bargaining unit. In that case a bargaining unit composed of all non-academic employees would also have been appropriate, and perhaps more appropriate as a subdivision of an employer unit. In arriving at its determination the Board was simply fact finding for the purpose of determining and describing an appropriate unit and as such considered the employer's organization and the extent of organization of employees with other factors. It was

not choosing between or among appropriate units or more or most appropriate units. Its fact finding was governed simply by what in all the circumstances was appropriate. That is a process that is carried on in many of the situations confronting this Board in making bargaining unit determinations.

21. The Board's process therefore in determining appropriate bargaining units is not directed to certifying the more or the most appropriate bargaining unit - the *Labour Relations Act* only requires that the unit of employees be appropriate; the Act does not require labour organizations to seek representations in the most comprehensive or optimum groupings unless such grouping constitutes the only appropriate unit. Cf. *Federal Electric Corp.* 157 NLRB 89 (1966); *Bagdad Copper Company* 144 NLRB 1496 (1963).

22. In conclusion we hold that where section 6(1) refers to "the unit of employees that is appropriate" it does not impose any requirement that the Board choose the more or most comprehensive unit - it only requires the Board to determine the unit of employees that is appropriate for collective bargaining having particular regard to the facts of the immediate application.

13. Similar views were expressed in *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1975] OLRB Rep. Jan. 7:

10. A primary theme set out in the *Labour Relations Act*, and affirmed by the Board, is the principle of freedom of association. The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining "between employers and trade unions as the freely designated representatives of employees". More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognizes that it is desirable that employees be able to organize in a form that corresponds with their own wishes. Given this legislative policy favouring the right of self-organization, the Board must be careful that its determination as to the appropriateness of the bargaining unit has given proper weight to the wishes of the employees. An earlier decision of the Board, *The Board of Education for the City of Toronto*, July OLRB Monthly Report 430, clearly endorses such an approach. In giving due consideration to the wishes of the employees, the Board, in the absence of contrary evidence must assume that their wishes are expressed by the applicant union as the representative of the employees. This point was made by the Board in *Board of Health of the York-Oshawa District Health Unit*, 1969 June OLRB Monthly Report 340.

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining. Section 6 of the Act specifically requires the Board to determine, not just a unit of employees, but "the unit of employees that is appropriate for collective bargaining". In other words, the Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization. This responsibility was recognized by the Board in the *McMaster University* case, 1973, February OLRB Monthly Report 103, and in the *Board of Education for the City of Toronto* case, *supra*.

12. The determination of what constitutes a viable collective bargaining structure requires the Board to consider matters of industrial relations policy, such as community of interest and fragmentation of employees. Community of interest may be a requisite for viable collective bargaining, since the representation of disparate employee groups by one bargaining agent may put impossible strains upon it as it performs its role in the bargaining process. At the other extreme, a too narrow definition of community of interest may create undue fragmentation of employees, leading to a weak employee presence at the bargaining table, or the possibility of jurisdictional disputes among competing bargaining groups. It should be observed, however, that the Act does not create any presumption in favour of the most comprehensive unit of employees, even though these employees may have a community of interest. Section 1(1)(b) of the Act states that: "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them." This provision makes it quite clear that the determination of appropriateness does not always lead to the con-

clusion that the most comprehensive unit is also the most appropriate unit. Consideration of the wishes of employees, and of industrial relations policy, may very well dictate that a smaller bargaining unit is the appropriate unit. This point was clearly made in *Board of Education for the City of Toronto* case, *supra*.

14. Generally speaking then, the Board seeks to balance the need for viable collective bargaining structures with the importance of facilitating entry into collective bargaining and freedom of association (see also *Board of Governors Reason Polytechnic Institute*, [1984] OLRB Rep. Feb. 371, *Adams Furniture Co. Limited*, [1975] OLRB Rep. June 491, *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, *K Mart Canada Limited*, [1981] OLRB Sept. 1250 and *National Trust*, [1986] OLRB Rep. Feb. 250).

15. In *Hospital for Sick Children*, *supra*, the Board also commented on the fact that modern collective bargaining thrives in many contexts:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

16. The Board went on to set out its approach in the following terms:

We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive and time-consuming process for deciding a relatively simple question; *does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the the employer.*

(emphasis added)

17. With this jurisprudential context in mind, we turn to the facts of the instant case. As a general proposition, a unit of all employees working at a particular home is consistent with the

Board's previous determinations and the pattern of collective bargaining in this sector. The exceptions agreed upon by the parties are not in issue here. There is, however, no reason on the facts before us to exclude the one part-time maintenance employee who works exclusively at Meadowcroft Place (Guelph). It was not suggested by either party that this individual did not share a sufficiently coherent community of interest to allow him to bargain together with the other employees at this location on a viable basis, nor that his inclusion would cause serious labour relations problems for the employer.

18. Similarly, there was no suggestion that the employees based at this particular home could not bargain together on a viable basis. The real issue between the parties is whether the exclusion of the floating employees would cause serious labour relations problems for the employer. As noted above, the responding party cites the possibility of jurisdictional disputes over floor-stripping or accompanying residents, and the potential of work stoppages relating to two bargaining units rather than one. The Board has recently commented on the impact of the possibility of jurisdictional disputes in determining bargaining unit configurations. In *Journey's End*, [1994] OLRB Rep. Nov. 1538 where there was some "relief" interchange of duties between employees the applicant sought to be included in the bargaining unit and those whom the applicant wished to exclude, the Board said as follows:

In these circumstances, jurisdictional disputes must be seen as neither inevitable nor insoluble. Their occurrence and resolution depend upon a variety of factors including the advent of another trade union in the workplace and the parties' inability to come to agreement on the proper scope of work associated with each bargaining unit. Likewise, the absence of "watertight compartments" surrounding job classifications means that grievances under a collective agreement over the entitlement of front desk staff to perform bargaining unit work are neither unavoidable nor guaranteed of success.

19. There was no suggestion in this case that there might be widespread or persistent jurisdictional disputes. Rather, counsel cited only floor-stripping and the possibility a maintenance person might "walk a resident down a hall" if other employees were busy. The latter was apparently speculative; it was not asserted that this did in fact occur at the present time. The very tentative and limited nature of these problems, together with the ability of the parties to prevent them, leads us to the conclusion that they do not represent the kind of serious labour relations difficulties that would cause us to reject an otherwise viable unit.

20. The same is true for the responding party's argument with respect to the possibility of increased work stoppages. Without commenting on the assertion that this home has not yet been declared a facility under the *Hospital Labour Disputes Arbitration Act*, (which would eliminate the right to strike and lockout), the facts before us do not amount to the kind of potential for multiple or alternating strikes that might lead us to the conclusion that the unit was not appropriate.

21. It is also far from clear that the unit proposed by the responding party would reduce the likelihood of such problems. In addition, it would indeed have the effect that the floating employees might be represented by a potential of twenty-five different bargaining agents with respect to the same employment with the same or overlapping employers. This strikes us as difficult to administer for both the employer and the union, not to mention the employees who might find it somewhat bewildering to have their working conditions and their coverage under any particular collective agreement change on a daily or even half-daily basis.

22. Typically, the Board has resolved this kind of problem relating to a mobile workforce by including them in a bargaining unit relating to their home base such as a head office or a particular terminal, or the location from which they are assigned. These are sometimes referred to as "at

or out of" bargaining units. In this manner, the difficulty of an employee potentially falling into more than one bargaining unit can be minimized.

23. We accept the proposition that the exclusive nature of bargaining unit representation means that there is a concomitant requirement that the bargaining unit be defined in a manner which ensures that an employee falls only within one bargaining unit at any particular point in time (see for example, *Western Inventory Services Ltd. supra*; *Laurent Lamoreux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618). It is not clear whether this proposition is strictly applicable to the facts before us, however, since the responding party is asserting that an employee would only be in the home's bargaining unit for the period he or she is working there. Of course, the scheme prepared by the responding party has other significant difficulties associated with it as we have noted above. More pertinent is the Board's approach to employees who may potentially fall within two units, in which the Board considers the unit to which the employee has the greatest attachment. In this case, the facts before us do not suggest that floating employees would have anything but the most casual attachment to the Guelph home.

24. The bargaining unit issue must be distinguished from the Board's rules of thumb for ascertaining the number of employees in the bargaining unit. Those rules only apply when the Board has determined the parameters of the bargaining unit, including the inclusion or exclusion of any particular employee classification or group under section 6 of the Act. Once the Board has determined the composition of the bargaining unit in general terms, it then moves on to ascertain the number of employees in that bargaining unit on the application date and the number of those employees who are members or who have applied to become members of the applicant. It is in this latter assessment that the Board applies various rules for determining whether any particular individual in the bargaining unit was employed in the unit on the date of application, including the Board's 30/30 rule which sweeps in bargaining unit employees not actually at work on the application date. Neither the application date rule nor the 30/30 rule determines the contours of the bargaining unit; rather, they are used to assess the number of bargaining unit members for the purpose of determining the percentage of membership support. (See *Western Inventory, supra*.)

25. For all these reasons, we decided that maintenance and housekeeping employees who float to different homes would not be included in the bargaining unit.

26. Following our decision, the parties were able to agree on the following description, which we find constitutes a unit of employees of the responding party appropriate for collective bargaining:

all employees of Meadowcroft Holdings Inc., c.o.b. as Execu-Care Nursing Services, 5M Management Services Ltd., and Meadowcroft Limited Partnership c.o.b. as Meadowcroft Place (Guelph) in the City of Guelph save and except supervisors, persons above the rank of supervisor, office and clerical staff and registered nurses.

For the purposes of clarity, the parties agree that maintenance and housekeeping employees who float to different homes are not included in the bargaining unit description.

27. The parties were also able to reach agreement to the effect that the positions of Charge Nurse and Cook are included in the bargaining unit and the position of Activity Co-ordinator/Assistant Administrator is not.

28. In accordance with the Rules of Procedure respecting applications for certification, the named responding party filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

29. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards were signed by each employee concerned and indicate a date within the six-month period immediately preceding the application date. The membership evidence was supported by a duly completed Declaration Verifying Membership Evidence.

30. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the responding party in the bargaining unit on December 9, 1994, the certification application date, had applied to become members of the applicant on or before that date.

31. A certificate will issue to the applicant.

1433-94-R; 1661-94-U Local Union 47 Sheet Metal Workers' International Association, Applicant v. 2714744 Canada Inc. c.o.b. **N C Sheet Metal**, Responding Party

Certification - Construction Industry - Union applying to represent bargaining unit of journeymen sheet metal workers - Board finding that certain individuals (whose Certificates of Qualification under *Apprenticeship Act* had lapsed for non-payment of fees) to be "journeymen sheet metal workers" and thus employees in the bargaining unit on the certification application date - Board agreeing with, but distinguishing decisions of the Board in *O.J. Pipelines*, *P&M Electric* and *Gorf* - Certificates issuing

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members R. W. Pirrie and J. Redshaw.

APPEARANCES: David Jewitt, Ross Mitchell, Bill Noel and Craig Hyland for the applicant; Neil Chartrand, Michael S. Ruddy, Jim Chartrand, Frank Medwenitsch and Brock Marshall for the responding party.

DECISION OF THE BOARD; March 30, 1995

I

1. This is an application for certification which was scheduled for hearing together with a related unfair labour practice complaint. On November 14, 1994 the Board disposed of the case with a brief "bottom line" decision, that reads as follows:

1. The name of the responding party in the title of proceedings is amended to read: "2714744 Canada Inc. c.o.b. N C Sheet Metal".
2. This is an application for certification which was scheduled for hearing together with a related unfair labour practice complaint.
3. Having regard to the evidence and representations before it, and for reasons to be given in writing, certificates will issue to the applicant in respect of units of the responding company's employees framed as follows:

all journeymen sheet metal workers and registered sheet metal apprentices
in the employ of 2714744 Canada Inc. c.o.b. N C Sheet Metal in the indus-

trial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and

all journeymen sheet metal workers and registered sheet metal apprentices in the employ of 2714744 Canada Inc. c.o.b. N C Sheet Metal in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

4. The Board notes that the companion unfair labour practice complaint has been settled. The terms of settlement need not be reproduced here. It suffices to say that the Board directs the terms to which the parties have agreed, and notes that the settlement is enforceable, in any event, pursuant to section 91(7) of the Act.

2. The issue dividing the parties was quite narrow. The Board had to decide whether certain individuals were "journeymen sheet metal workers" and thus employees *in the bargaining unit* described in paragraph 3 of the decision of November 14, 1994. The Board decided that they were, and that the union was entitled to represent them in the sheet metal workers' bargaining unit.

3. That issue will be discussed below. Before doing that though, it may be useful to briefly sketch in the way in which organizing is done in the construction industry. In that regard, we should record section 6(3) of the Act which reads as follows:

["Craft" bargaining units]

6.- (3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

II

4. The construction industry is dominated by "craft unions" - that is, trade unions that represent employees with particular trade skills (carpenters, electricians, sheet metal workers etc.). Craft unions organize along craft lines, and their bargaining units are fashioned accordingly. Under section 6(3) of the Act, a craft union meeting the specified criteria is entitled to a "craft unit" as of right. It remains for the Board to determine how many employees are actually members of the craft on the application date and thus properly included in the craft bargaining unit.

5. Since 1978 the legislature has prescribed a system of province wide bargaining *by trade*. The details of that framework need not be elaborated here. It suffices to say that the provincial bargaining scheme continues to reflect the prevailing organizing pattern and bargaining structures of the construction industry: craft unions and craft bargaining units. Indeed, since 1978, craft unions have been *obliged* to seek craft bargaining units pertaining to, and defined in respect of, their particular trade (carpenters, electricians, sheet metal workers and so on).

6. Craft skills are acquired through a system of training and apprenticeship. It usually takes a number of years to become a fully qualified "journeyman." In many cases, the acquisition

and certification of trade skills is required by the *Apprenticeship Act* (formerly *The Apprenticeship and Tradesmen's Qualification Act*).

III

7. N C Sheet Metal operates a business in the construction industry. As its name suggests, it is in the "sheet metal" business.

8. At the time of the certification application on July 20, 1994, N C Sheet Metal was engaged in the installation of hearing, ventilating and air conditioning, and miscellaneous sheet metal work at the Ottawa Civic Hospital. That job has been ongoing since the spring of 1991.

9. The applicant is a "construction trade union" that according to established trade union practice represents sheet metal workers. The "craft unit" applied for by the applicant is its "standard craft unit" and is appropriate for collective bargaining.

10. The employees affected by this application were hired by the company as "sheet metal workers". At all material times they were doing sheet metal workers' work - that is work which falls within the sheet metal trade and would ordinarily be done by a journeymen sheet metal worker or a registered sheet metal apprentice. Each of the employees in the union's proposed unit is either a registered apprentice or has earned a Certificate of Qualification in the sheet metal work trade, issued pursuant to the *Apprenticeship and Tradesmen's Qualifications Act* (i.e. they have completed the required five year program of training and experience necessary to become a qualified/certified "sheet metal worker").

11. There is no dispute that a significant majority of the employees affected by this application wish to be represented by the union in a collective bargaining relationship with their employer. The problem is that three of those employees have allowed their Certificates to lapse for non-payment of fees. Those employees have continued to work for the employer as a "sheet metal workers", they have been paid as a "sheet metal worker", and they have continued to do "sheet metal work"; moreover no one argues that they were no longer capable of performing the work to which they had been assigned. But it is also not disputed that on the date the union applied for certification, their Certificates of Qualification were not in good standing.

12. The expiry of the employees' certificates some months prior to the certification application had no practical affect on their work situation. They continued to work for NC Sheet Metal, as they had in the past, doing the same work that they did before. Indeed, the practice of the Ontario Training and Adjustments Board is to permit the holder of Certificate of Qualification that has expired to make application for its renewal after such expiry. Upon payment of the prescribed fee, a receipt is issued to the applicant which serves as proof of renewal pending a renewed Certificate of Qualification being prepared and forwarded by ordinary mail.

13. It is a little difficult to square the prescribed fee schedule with the old and new expiry dates on the Certificates for the disputed employees in this case. It appears, though, that as long as the tradesman is prepared to pay the arrears and any current fees, the Certificate is returned to "good standing" as if there had been no dereliction.

14. We were told that, in practice, a Ministry of Labour Enforcement Officer would not direct a worker off the site merely because he did not hold a valid subsisting Certificate. Instead, the inspector would provide the worker with a period of time to pay the required renewal fee to make the Certificate current. There is no evidence that any worker with a lapsed Certificate has ever been prosecuted, penalized, or prohibited from working - provided that he paid the required

renewal fees within a reasonable period of time. In other words, the agency charged with the responsibility of insuring that workers have a valid Certificate of Qualification will not insist on their removal from the work site if they do not; nor does anyone suggest that the workers qualifications, skills or trade identification is in any way related to the non payment of annual fees.

15. About two weeks after the date of the application for certification, the employees with lapsed certificates paid the required renewal fees and were issued a receipt which had the effect of making their certificates current as of that date.

IV

16. The employer argues that the three disputed individuals were not "sheet metal workers" properly included in the union's proposed bargaining unit because they did not have current Certificates of Qualification on the date that the union applied for certification. The employer relies upon the decisions of the Board in *O.J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976, *P & M Electric (1982) Ltd.*, [1989] OLRB Rep. June 638 and, more recently, *Gorf Contracting Limited*, [1991] OLRB Rep. April 483. In each of those cases the Board ruled that only tradesmen who were journeymen or apprentices in the trade, within the meaning of the *Apprenticeship Act* [or the *Apprenticeship and Tradesmen's Qualifications Act*] on the date of the application, were eligible to be in the craft bargaining unit.

17. In *O. J. Pipelines*, *P & M Electric* and *Gorf* the Board rejected the submission that it should determine the issue solely on the basis of the work that the individuals were doing. The Board noted that when dealing with a certified trade, its "craft" bargaining unit determinations should be consistent with the legally specified qualifications for that trade - particularly under the provincial ICI bargaining scheme, where the designation orders specify the trades which "belong" to each employee bargaining agency, [see *O.J. Pipelines Incorporated* at paragraph 7]. Thus, in *P & M Electric*, *supra*, the Board commented:

In our view, it would be inconsistent with the *Apprenticeship and Tradesmen's Qualification Act* for the Board to find that persons who are neither qualified journeymen nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. . . . In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who can not lawfully work in the bargaining unit before or after certification and who share no real community of interest with [electricians] who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualifications Act*.

V

18. We agree with the results and the reasoning in these decisions. But the instant case is distinguishable. Here, the individuals in question are qualified journeymen, who have received the necessary Certificate of Qualification. They share a community of interest with their fellow workers in the proposed bargaining unit, and the evidence is that the *failure to pay the prescribed fees does not prevent them from working, nor require their removal from a job* provided (as they have done) they bring their Certificates into good standing by paying the outstanding remittances.

19. This is not a case like *O.J. Pipelines* where the disputed individuals had never been properly qualified and accordingly were always prohibited from doing the work in question. Here the disputed employees are both journeymen sheet metal workers in a functional sense, and have clearly qualified for certification as such under the applicable legislation; moreover the practice under that legislation is not to attach immediate consequences to the non payment of periodic

license fees, (i.e. the loss of a right to work at the trade for which the individual is qualified). In the absence of evidence that the regulatory agency attaches great significance to the employee's administrative default, we are most reluctant to do so - not least because it would produce post certification changes to the composition of the bargaining unit in a wholly idiosyncratic way, entirely unrelated to the purposes of either the *Labour Relations Act* or the *Apprenticeship Act*.

20. In our view, for the purpose of the bargaining unit determination under sections 6(3) and 146 of the *Labour Relations Act*, the disputed individuals are "journeymen sheet metal workers" employed in the bargaining unit on the application date. This determination is consistent with both labour relations realities and what we understand to be the actual practice under the legislation to which the employer refers.

21. For these reasons the Board found and hereby confirms that :

- (1) The applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency.
- (2) Pursuant to the designation issued by the Minister under section 141(1) of the Act on April 28, 1986, the designated employee bargaining agency is the Sheet Metal Workers' International Association and the Ontario sheet Metal Workers' Conference consisting of Locals 30, 47, 235, 392, 397, 473, 504, 537, 539, 562 and 269 of the Sheet Metal Workers' International Association.
- (3) This is an application for certification within the meaning of section 121 of the *Labour Relations Act* and is an application made pursuant to section 146(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

- (4) Pursuant to section 146(1) of the Act, all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all all journeymen sheet metal workers and registered sheet metal appren-

tices in the employ of the responding party in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

- (5) On the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on July 20, 1994, the certification application date, had applied to become members of the applicant on or before that date.

22. Section 146(2) of the Act, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 146(2) of the Act, the Board ruled on November 14, 1994 that a certificate would issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 19 above in respect of all all journeymen sheet metal workers and registered sheet metal apprentices in the employ of 2714744 Canada Inc. c.o.b. N C Sheet Metal in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

23. Further, pursuant to section 146(2) of the Act, the Board ruled that a certificate would issue to the applicant trade union in respect of all all journeymen sheet metal workers and registered sheet metal apprentices in the employ of 2714744 Canada Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3562-92-R International Association of Machinists and Aerospace Workers, Applicant v. Premark Canada Inc., Responding Party

Bargaining Unit - Combination of Bargaining Units - Remedies - Board earlier combining newly certified service technician bargaining unit in Sudbury with pre-existing service technician bargaining unit in southern Ontario - Union and employer agreeing on how to integrate the bargaining units, except for issue of wages - Parties returning to Board for its direction under subsection 7(5) of the Act - Board directing that Sudbury employees receive annual wage increases of 4 percent in 1993 and 1994

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *D. G. Wozniak* and *E. G. Theobald*.

APPEARANCES: James Hayes and Dave Ritchie for the applicant; T. W. Sargeant and Paul George Stethem for the responding party.

DECISION OF THE BOARD; March 22, 1995

1. The Board by decision dated June 15, 1993 [now reported at [1993] OLRB Rep. June 540] directed that two bargaining units be combined and referred the matter back to the parties to provide them the opportunity to resolve the effects of the Board's decision. The Board remained seized in the event that it was necessary to provide remedial relief. The parties were unable to reach agreement and requested that the Board schedule a hearing to deal with the outstanding matters.

2. For ease of reference the applicant will be referred to as the "union" and the responding party will be referred to as the "employer".

3. The parties were in agreement that it was unnecessary to call further evidence and with the exception of the additional facts set out below, were content to base their arguments on the factual findings set out in the Board's earlier decision. The relevant portions of that award read as follows:

• • •

4. Premark manufactures, sells and services food preparation equipment, warewash and waste equipment and weight/wrap equipment. This equipment is utilized in commercial kitchens such as are found in restaurants and hospitals. Some examples of the equipment are meat slicers, weigh scales and certain refrigerated units.

5. Premark's main administrative offices and central warehouse are located at 190 Railside Road in North York. The company also has a central service branch located at 50 Mural Street in Richmond Hill. The union has been the bargaining agent for the employees working out of the Richmond Hill location for many years. The bargaining unit consists of approximately 20 individuals all of whom are employed as and classified as service technicians. The recognition clause of the current collective agreement in force between the parties is as follows:

ARTICLE 2 - RECOGNITION

2.01 The Company recognizes and accepts the Union as the sole collective bargaining agency for all its employees at 50 Mural Street, Richmond Hill, save and except Shop Managers, Field Service Supervisors, persons above the rank of Shop Manager or Field Service Supervisors and office and sales staff.

2.02 Agents, salesmen and out-of-town trainees who may be attached to the Company for training purposes shall not be used to displace regular employees in the bargaining unit, but shall be regarded as supernumerary and, as such, excluded from the application of this agreement.

6. The vast majority of the work of the service technicians involves the service, repair and maintenance of Premark equipment found in commercial kitchens. They also perform a minimal amount of installation work. The duties of Mr. Ritchie include responsibility for this bargaining unit and he has been associated with it since 1978. Until four years ago he was responsible for collective bargaining with Premark on behalf of the union.

7. The Board (differently constituted) by decision dated April 5, 1993 certified the union for a bargaining unit consisting of:

all employees of Premark Canada Inc. at its PMI Food Equipment Group Canada Division in the Regional Municipality of Sudbury and the Counties of Algoma, Sud-

bury, Cochrane, Temiskaming, Nipissing, and Parry Sound, save and except shop managers, field service supervisors, persons above the rank of shop manager or field service supervisor and office and sales staff.

For ease of reference, this bargaining unit will be referred to as the northern bargaining unit and the bargaining unit operating out of the Richmond Hill location will be referred to as the southern bargaining unit. The northern unit is made up of three employees. One employee is located in Sault Ste. Marie, one in Sudbury and one in Cochrane. All three are classified as service technicians and perform duties identical to their counterparts in the southern bargaining unit. It is these two bargaining units which the union seeks to combine.

8. There are three Premark sales and service branches in Ontario. They are located in Hamilton, Ottawa and Toronto. The service technicians operating out of the Hamilton and Ottawa locations are not included in either of the bargaining units affected by this application.

9. Mr. Randy Taylor, a service manager for Premark, is responsible for the Toronto Branch located in Richmond Hill. In addition to the service technicians included in the southern bargaining unit, Mr. Taylor is also responsible for the service technicians located in the northern unit. He directs the work assignments of all the service employees including the three service technicians in the northern bargaining unit. The three individuals in the northern unit, as well as the employees in the southern unit, report to the Richmond Hill Office and receive their work assignments from a dispatcher in the Richmond Hill location. Employees are dispatched by two-way radio, pager or telephone. Employees primarily work out of their homes and vehicles. There has never been any intermingling of employees or movement of employees between the southern bargaining unit and the northern bargaining unit.

10. All the employees in the northern bargaining unit and the southern bargaining unit are paid by direct deposit which is administered by the payroll department at the Railside Road location. Benefits are also centrally administered from Railside Road. The three individuals employed in the northern bargaining unit are paid less than the employees in the southern bargaining unit with equivalent seniority. Employees in the southern bargaining unit with their seniority and skills currently receive the top hourly rate which is \$18.90 per hour plus a 75¢ per hour premium if they are licensed to work with equipment which utilizes gas. Therefore a technician in the southern bargaining unit with a gas licence receives \$19.65 an hour. Two of the three employees in northern bargaining unit currently receive \$18.25 per hour and the other is paid \$18.50 per hour. These rates include the 75¢ premium for a gas licence. The employees in the northern bargaining unit received their last increase in January 1993. The collective agreement covering the southern bargaining unit runs from August 11, 1992 to August 10, 1995. The employees receive wage increases in August in each of the three years of the agreement. The top hourly wage rate for service technicians in the southern bargaining unit will increase to \$19.52 on August 11, 1993. The employees in the northern bargaining unit do not receive the same benefits as the employees in the southern bargaining unit.

11. The reasons behind the union's decision to seek to organize the northern bargaining unit and then make application to the Board to have it combined with the southern bargaining unit were outlined for the Board by Mr. Ritchie. Prior to the enactment of Bill 40 the union did not seek to obtain bargaining rights for the northern unit as it was not economically feasible to have such a small bargaining unit. The union would not normally consider such a small local due to the costs associated with the negotiation and administration of the collective agreement. Therefore although the union would not normally consider such a small bargaining unit, in this case because it felt it may be possible to combine the new northern bargaining unit with the southern bargaining unit, the union decided to organize the three employees located in northern Ontario. If the two bargaining units were not combined, the union also expressed concerns that consistency in the treatment of employees performing the work of a service technician might suffer if there were two separate locals with two separate collective agreements.

12. Mr. Knox on behalf of Premark expressed concern that the company might not be able to manage a profitable organization in northern Ontario if it was forced to compensate the service technicians at the same rate as is paid to the service technicians in its southern Ontario bargaining unit, as Premark cannot charge an equivalent service charge to its northern Ontario customers. Premark charges its customers for service calls on an hourly basis. The service charge rate in

the Toronto area is \$75.00 per hour. The service charge rate is less in northern Ontario and is \$67.00 per hour. The northern Ontario rate is the highest rate the market can bear. Many independent service providers compete with Premark in northern Ontario, therefore to keep its customers, a lower rate must be charged. The service technicians in southern Ontario complete an average of 4.5 service calls per day. Due to the greater geographical distances between calls in northern Ontario the technicians can only complete an average of 2.5 calls per day. As the distances travelled in the north are greater, the travel costs are higher and the service vehicles must be replaced more frequently than the vehicles in southern Ontario. The operating costs for the vehicles in northern Ontario are approximately \$200.00 more per month than the cost for the vehicles in southern Ontario.

13. Mr. Knox admitted in cross-examination that the company's concern in this application was not that the bargaining units would bargain together but that it might not be possible to negotiate a different wage rate in the northern unit. Mr. Knox also expressed concerns with regard to the manner in which certain aspects of the southern Ontario collective agreement would apply in northern Ontario. Stand-by pay and the grievance procedure were examples cited to support this.

14. The employer and the union enjoy a good working relationship. Very few grievances are filed by the union and there appears to be a desire on the part of both sides to work out any problems together.

• • •

4. The agreed statement which provides the additional facts reads as follows:

FACTS

1. The essential facts sufficient to describe the business of the Employer and the work of the service technicians in the bargaining unit are set out in the Board decision dated June 15, 1993.
2. Following the release of the Board decision, the Union and Company met and also communicated by telephone as directed by the Board "to resolve if possible the manner in which the three employees from the northern bargaining unit are to be dealt with under the new bargaining unit structure".
3. The parties have made no changes at all to the language of the collective agreement referable to service technicians in the North. An understanding was reached as to how the "call out" provision would apply.
4. The parties have not been able to resolve one issue; that is, the applicable maximum wage rate for the northern service technicians.
5. The position of the parties is as follows. In each case, the reference is to the maximum possible hourly rate inclusive of any premiums which may be available:

A] Company

Jan/93	: \$18.50
Jan/94	: \$18.83

proposal:

March 11/94	: \$19.21
Aug. 11/94	: \$19.59

B] Union

all rates as per existing collective agreement:

Jan/93	\$19.65
Aug/93	\$20.27
Aug/94	\$21.00

6. The parties further agree that the panel should have reference to the evidence before it in the proceeding leading to the June 15, 1993 decision.
7. As previously stated by Mr. Ritchie, the Union represents service technicians, performing similar functions to those in the instant case, who are employed by Toledo Scale and Howe Richardson. Those employees similarly perform work in "Northern Ontario". They receive the same rates of pay as do their colleagues employed in the "south" or elsewhere in Ontario. There are no regional wage rates in the unionized sector of this service sector.

 "P. Stethem"

PMI

 "Paul Ritchie"

IAM

November 22/94

5. In response to questions from the panel, the parties clarified that paragraph three as set out above meant that the parties had agreed to extend the coverage of the existing collective agreement to the newly combined unit with two exceptions. These exceptions pertained to the "call out" provision and wages. The parties were able to reach an agreement with regard to the call out provision but were unable to agree on the wages to be paid to the three individuals formerly in the northern bargaining unit. Therefore the only matter remaining in dispute between the parties was the issue of wages.

Argument

6. The majority of the union's submissions were of a policy or general nature. Union counsel suggested that the Board should articulate and follow a number of broad presumptions when dealing with the ramifications of a consolidation order. Counsel on behalf of the union pointed to section 7(5) of the Act as providing the Board with a very broad discretion. Counsel urged the Board to focus on the purposes of section 7 which he stated were to stabilize bargaining structures; to enhance industrial stability; and to facilitate unionization and collective bargaining. In counsel's opinion the Board now has the power to monitor, craft or develop bargaining unit structures that are in the public interest over the longer term.

7. Counsel for the union suggested that when the Board combines bargaining units, such as it did in this case, there should be a presumption that the existing collective agreement should automatically apply. The Board, in counsel's opinion, should be very reluctant to exercise the extraordinary powers in section 7(5). Assuming that the automatic application of the collective agreement causes no serious labour relations problems, there should be a significant onus on the

party opposing this automatic application to demonstrate that the existing collective agreement cannot serve the purposes of the new group without Board intervention. Counsel stated that it is difficult to see a case which could be more supportive of this argument than the case before the Board in this instance. The existing collective agreement covers the same classification, the work performed by this single classification is identical, the parties have resolved everything else, the industry practice is supportive, and the cost of rolling the three individuals into the collective agreement is minimal. Counsel acknowledged that there were other factual situations which would not be so supportive of his argument.

8. Union counsel also argued that there should be: a presumption against mid-term strikes or lock-outs and that industrial stability should be paramount; a presumption of equal pay for equal work and that in this case the Board should be reluctant to impose a two tier wage system; a presumption that the three individuals who recently organized should receive the same opportunities to improve their situation as if there had not been a consolidation order i.e. as if they had had access to First Contract Arbitration; and finally that the Board should presume that the legislature did not intend to set the Board up as a broadly mandated interest arbitrator (with emphasis on the word "broadly").

9. In specifically addressing the only issue in dispute between the parties, the applicable wage rates, counsel for the union argued that the Board would not be facilitating the objectives of section 7 if it were to direct a two tier wage structure, as to do so would not facilitate viable and stable collective bargaining.

10. In support of his policy arguments counsel on behalf of the union referred the Board to *The Arbutus Club and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-CANADA), Local 3002*, 21 CLRBR (2d), a decision of the British Columbia Labour Relations Board and *Premier Cablesystems Ltd. and International Brotherhood of Electrical Workers, Local 213*, [1982] 1 CLRBR, a decision of the Canada Labour Relations Board.

11. Counsel for the employer started his argument by stressing that in suggesting a lower wage rate for the three individuals located in northern Ontario the company was not treating them unfairly. The company was prepared to and in fact had proposed wage increases for these three people which in counsel's opinion were more than fair. Counsel objected strenuously to the union's proposition that in cases such as this one, there should be a presumption that an existing collective agreement should automatically be extended to cover employees in a newly certified unit after it was combined with an existing unit. Counsel pointed out that in looking at section 7 it was difficult to see why there should be a presumption that the mature relationship would automatically apply.

12. Counsel for the employer argued that in combining bargaining units the Board changes bargaining power. On the facts before the Board, counsel pointed out that a three person unit would not have had the same negotiating power as it does when it bargains as part of a larger unit. The Board should not compound that shift in power by saying that the northern employees get everything previously acquired by the existing unit. Counsel also pointed out that if there was a presumption that the existing collective agreement would simply be extended to cover the new employees if one party sought this, then there was absolutely no need to bargain. If the parties couldn't move away from the existing position or the existing collective agreement, counsel questioned why the Board sent them away to negotiate the effects of the combination order. Counsel urged the Board not to create any presumptions that would create inequities between the parties and thereby hamper the bargaining which takes place after a consolidation order.

13. Counsel for the employer was also concerned that the union was re-arguing an issue

which had already been dealt with by the Board at the time it issued the consolidation order, namely, whether the existing collective agreement should be automatically extended to the newly certified group. Counsel pointed to paragraph 30 of that decision where the Board says:

"The parties should not assume that when the Board concludes that it is appropriate to consolidate a new bargaining unit with a long-time bargaining unit, that the employer will be directed to provide all of the existing terms and conditions of employment, which are the result of many years of negotiations, to the employees in the newly certified bargaining unit".

Counsel argued that nothing had changed and that the same reasons exist now for not automatically extending the collective agreement as did at the time of the first hearing. In counsel's view, if the legislature had intended this result (the automatic extension of the existing collective agreement) they could have provided for it in the legislation. Counsel referred the Board to *Olympia & York Developments Limited*, [1994] OLRB Rep. May 583, in support of his position that there should not be a presumption that an existing collective agreement will automatically be extended to cover the new employees.

14. Employer counsel questioned the union's assertion that rolling the northern employees into the collective agreement would enhance stability. He pointed out that stability is not affected by how much money these three individuals earn. Counsel argued that equal pay for the same work was not a relevant consideration. He also questioned the union's position that the employer was seeking relief under section 7(5) and that the Board should only interfere in extraordinary circumstances. He argued that section 7(5) should not replace bargaining, but if the parties cannot agree then the Board must assist them.

15. Counsel for the Employer indicated that the company had legitimate reasons for not wanting to pay the same wages to the northern employees. These were outlined in the earlier decision. He admitted that the company was not saying it could not afford the increase. It might make the operation less viable but it would not push them into bankruptcy to pay the same wages to the northern employees. Therefore, counsel suggested that the Board should act as an interest arbitrator and decide the appropriate wage rate for the northern employees.

16. Both counsel were in agreement that the Board should adopt a case specific approach with regard to the remedies available in combination cases. Both parties felt that it was unnecessary to address some of the thornier questions which could arise such as the availability of strikes or lock-outs or the access to first contract arbitration in combination cases.

17. The relevant section of the Act reads:

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.

3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

18. At the time the Board consolidated the two bargaining units it directed the parties to resolve if possible the effects of the order through the process of collective bargaining. The Board declined to deal with the effects of the consolidation order until the parties had been provided an opportunity to negotiate on this point. This approach has been consistently followed and it appears to have met with considerable success. In only a very small percentage of the cases have the parties returned to the Board for further remedial directions.

19. In *Olympia & York Developments Ltd.*, [1994] OLRB Rep. May 583, the Board combined a newly certified bargaining unit with an existing bargaining unit and referred the matter back to the parties to explore the way in which the "added on group" should be accommodated within the broader bargaining structure. The parties did not resolve their differences and the applicant or union in that case brought the matter back before the Board and argued that the only "terms" upon which it was required to bargain were those relating directly to the new classifications which had been added pursuant to the combination order. The union in that case argued, as did the applicant before us, that the subsisting collective agreement with its terms and conditions should immediately apply upon the consolidation of the bargaining units and without any need or requirement for negotiations. This argument was rejected by the Board and as the parties had not discussed the issues still in dispute the Board remitted the matter back to them. In reviewing the Board's expectations when it requires the parties to negotiate the impact of a combination order prior to making any directions pursuant to section 7(5), the Board stressed that while it was neither desirable nor possible to be too definitive concerning the content of that bargaining, the bargaining must encompass the kind of reasonable efforts and full, rational discussion that have always been part of the "section 15" duty to bargain in good faith. With that assistance from the Board, it

appears that the parties were able to resolve their differences as the case has not come back before the Board.

20. At the time of the Board's first decision in the case before us, we dealt with the union's argument that the Board should simply extend the coverage of the existing collective agreement to the newly certified group and rejected it. We instead directed the parties to bargain on the effects of the consolidation order.

21. There is no dispute in the case before us that the parties have to a large extent, negotiated the effects of the consolidation order. They have agreed to extend the coverage of the collective agreement to the "add on" group except for those portions of the agreement dealing with call in pay and wages. The negotiations have therefore been partially successful in resolving the effects of the consolidation order. The parties have agreed to extend the collective agreement coverage, and they did so as a result of negotiations. It is one thing for the parties to agree to do this in the course of bargaining and a totally different matter for the Board to direct this result.

22. Since the negotiations failed to resolve all of the outstanding issues, the union has once again requested that the Board roll the add on group of employees into the existing collective agreement. It has buttressed its argument in favour of this with a number of policy arguments. However, for the same reasons previously expressed it is not appropriate for the Board to simply extend the coverage of an existing collective agreement to an employee group who could not have been contemplated at the time that agreement was entered into. Given the evolving nature of the jurisprudence, it is also not appropriate at this stage for the Board to articulate a number of presumptions applicable in all cases pursuant to section 7 of the Act. However, it should not be assumed that the Board would never find it appropriate to extend an existing collective agreement to a newly certified and then combined unit of employees. For example, in the retail sector, if an organization had two stores within the same municipal boundary, one of which was a party to a collective agreement and the other newly certified and combined with the existing bargaining structure, the Board might find it appropriate after having had regard to such things as market conditions, local wage rates and labour pool availability to simply extend the terms and conditions of the existing collective agreement to the newly certified group. This is an issue that could be raised and dealt with (as was done by the union in the case before us) at the time of the hearing into whether or not it is appropriate to combine the bargaining units.

23. The Board's practice in combination orders has been to direct the combination of the bargaining units and refer the matter back to the parties to resolve the effects of this order. Were we to simply roll the newly certified group of employees into an existing collective agreement after the parties have conducted negotiations as the union is now asking us to, it would negate the need to negotiate. What would be the point in attempting to negotiate if one party could simply request and be granted an order extending the collective agreement? It appears to us that if the Board adopted the presumption urged upon us by the union, namely that when the Board combines bargaining units there should be a presumption that the existing collective agreement should automatically apply, we would be undermining the current practice, which is working well. There would be no incentive to bargain if such a remedy was readily available. Collective bargaining is one of the corner-stones of labour relations in this province. The Board's experience has demonstrated that open and frank discussions about matters that concern both parties often results in their resolution in a mutually beneficial manner. Therefore, it is always going to be preferable and in the interests of viable and stable labour relations for the parties to negotiate and resolve, without Board intervention, the effects of a combination order. For all of these reasons we decline to order the automatic extension of the terms and conditions in the existing collective agreement to the add on group.

24. Although it was only addressed briefly, both parties were content to have the Board resolve the question of the appropriate wages for the three add on employees pursuant to the discretion found in section 7(5) of the Act.

25. The positions put forward by the parties with regard to wages were quite simple. The employer argued that it had made a reasonable wage proposal (its offer amounted to a 2% increase in March 1994 and a further 2% increase in August 1994) and that there was no reason why the add on employees should expect the substantial wage increase which would result if the Board simply directed the employer to pay the wages existing in the collective agreement. The employer conceded that it could afford to pay the collective agreement rate but argued that it would make the Northern operation less viable. In our earlier decision in this case, we accepted the employer's evidence that it had legitimate reasons for paying the employees located in northern Ontario less than it paid its employees in southern Ontario. To reiterate those reasons, the employer can not charge its customers as much for a service call in the north, the number of service calls per day completed by each technician in the north are fewer, and the vehicle operating costs are higher in the north as the distance between customers is greater.

26. The Union took the position that the Board should not create a two tier wage structure and that as the "add on" employees were employed in the same classification, performing the same duties, they should receive the same wages. If we were to award the wage rates proposed by the union it would result in a 6.2% wage increase in January 1993, with a further 3.4% increase in August 1993. Therefore in 1993 the newly certified employees would receive a 9.6% increase if we accept the union's proposal. In 1994 the union is asking for an additional 3.6% increase effective in August, 1994. The union pointed to the fact that the parties had agreed that the industry practice does not support regional wage rates such as the employer is proposing in this case. Regardless of an employee's location, the other employer's in this service industry pay the same wages to their technicians.

27. If the union was entitled to pursue first contract arbitration on behalf of the newly added employees (and we are not to be seen as deciding this issue) the Board would apply certain principles in determining the appropriate terms and conditions of the first collective agreement. The Board's approach when arbitrating a first collective agreement was articulated in *Egan Visual Inc.*, [1986] OLRB Rep. Dec. 1687 as follows:

...

3. It would be unwise for the Board to attempt to definitively set forth the contents of a collective agreement which are applicable to all circumstances. As more first contract arbitrations are filed with the Board, no doubt criteria will arise as a result of experience in a greater number of situations. There are no statutory guidelines in the Act which require the Board to have regard to a given standard of comparison. The Board would, however, adopt the language set forth in *Burlington Northern Air Freight (Canada) Ltd.*, [1986] OLRB Rep. Oct. 1327. In that case the Board indicated that it had adopted a somewhat similar approach to the reasoning of the British Columbia Labour Relations Board in *London Drugs Ltd.*, [1974] Can. LRBR 140 at page 147. The Board agrees that applications under section 40a of the Act with respect to a first contract arbitration by the Board should not be used to achieve major breakthroughs in collective bargaining, but rather, the Board would try to settle the terms of a collective agreement which reflect a fairly general consensus as to what should be the contents of a collective agreement having regard to the particular circumstances of each collective bargaining situation. The Board also agrees that the terms of the collective agreement should be sufficiently attractive to the employees who are in the bargaining unit defined in the collective agreement that they would give serious consideration before deciding to terminate the bargaining rights of the applicant.

...

In *Arrow Games Inc.*, [1991] OLRB Rep. Jan. 7 the Board stated:

18. . . . The adjudication of an interest dispute between two parties is, in our view, a qualitatively different type of adjudication from other proceedings under the Act. The function of an adjudicator in an interest dispute is to, in essence, complete the process of negotiations that has up to that point, failed between the parties themselves. Obviously, the award of an interest arbitration board is final and binding upon the parties. . . . Both parties are putting forward proposals which they seek to have the Board adopt and incorporate into its award which will form the actual terms and conditions of employment for the employees in the bargaining unit. In interest disputes before the Board pursuant to section 40a of the Act, the Board has a broad discretion to determine those issues that remain in dispute between the parties. The result is the completion of the negotiating process and the creation of the collective agreement between the parties.

28. The comments of the Board outlined above may be utilized to provide some guidance in the situation we are dealing with in this case. As the parties failed to negotiate all of the terms and conditions which would govern the employment of the newly certified group, it falls to the Board to, as was noted, complete this process.

29. It is not unusual nor unreasonable for collective agreements which cover a wide and diverse geographic region to provide for differences in certain terms and conditions of employment dependent on the particular area within the geographic region in which an employee works. In the ICI sector of the construction industry for example, provincial agreements exist which include appendices providing for local variations in, amongst other things, wages. Thus for example, a carpenter doing work in Cambridge may be paid less than a carpenter in Hamilton who is doing exactly the same work. Different wage schedules exist for different Board areas in the construction industry. While the Board appreciates that any analogy to the construction industry in the context of a combination application is of limited value (as section 7 does not apply to the construction industry), nevertheless, in the construction industry individuals performing the same work in different parts of the province are paid different wages for legitimate reasons such as, market conditions, profitability of that area within a company's sphere of operations, local wage rates and labour pool availability. These same circumstances may also exist in an "industrial" context where the company's operations are located in different parts of the province.

30. After having carefully reviewed the evidence and the submissions of the parties we are of the view that the appropriate wage increase for the newly certified employees lies somewhere between the positions taken by the parties. In coming to this conclusion, we would point out that we have very little evidence before us to assist us in determining what the appropriate wage increase should be. For all of the reasons previously articulated it is not appropriate to simply extend the existing wage rates in the collective agreement to this group of employees. Given the current economic conditions and the circumstances under which the employer operates in northern Ontario, the union's position that the newly certified group should receive a 9.6% increase for 1993 is unrealistic. However, we are also of the view that the employer's offer is too low. Accordingly, we direct the employer to provide the newly certified group with a 4% increase on the existing rates for 1993, effective August 1, 1993 and an additional 4% increase effective August 1, 1994. In arriving at this figure, we have attempted to complete the process of negotiations which although largely successful, failed to resolve the appropriate wage rate.

31. In the event the parties have any difficulty implementing this award the Board shall remain seized with regard to further relief.

4229-94-M United Steelworkers of America, Applicant v. Royalguard Vinyl Co., A Division of Royplast Limited, Responding Party

Final Offer Vote - First Contract Arbitration - Reference - Employer applying to Minister of Labour for final offer vote under section 40 of Act after first contract arbitration initiated under section 41 - Whether Minister should direct vote - Board holding that section 40 contemplating availability of strike or lock-out activity as pre-condition to employer's right to request final offer vote - Initiation of first contract arbitration precluding strike or lock-out by virtue of subsection 40(13) of the Act, thereby foreclosing employer from requesting final offer vote - Board advising Minister not to direct vote

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *Orval R. McGuire* and *H. Peacock*.

APPEARANCES: *Brian Shell*, *Mark Rowlinson* and *Fil Falbo* for the applicant; *Joseph Liberman*, *Doug Dunsmuir* and *Steve Cork* for the responding party.

DECISION OF THE BOARD; March 14, 1995

1. This is a reference from the Minister to the Board pursuant to section 109 of the *Labour Relations Act* (the "Act"). The reference relates to a request by Royalguard Vinyl Co., A Division of Royplast Limited (the "employer") for a final offer vote pursuant to section 40 of the Act, after first agreement arbitration had been initiated pursuant to section 41 of the Act.

2. The terms of reference are as follows:

1. On December 6, 1994, the Union requested first contract arbitration in accordance with section 41(1.2) of the Labour Relations Act from the Minister. The request was received the same day.

2. The parties appointed nominees and both parties agreed on the Chair for the Board of Arbitration. Two hearing dates were also agreed to: February 6 and February 20, 1995.

3. On February 6, 1995, the parties attended the first day of hearing before the Board of Arbitration. After some submissions, the hearing was adjourned to the next scheduled date.

4. By letter dated February 17, 1995, the Employer requested that the Minister proceed with a last offer vote in accordance with section 40 of the Act.

5. Like section 41, section 40 of the Act also requires the Minister to take action and as such the Minister has arranged that the Labour Relations Board take the preliminary steps to arrange a last offer vote. These steps are taken prior to the Minister directing the vote. A meeting to determine an appropriate vote date was scheduled for February 27, 1995.

6. The Union objected to the directing of a vote in a letter dated February 22, 1995. The Union argued that the Employer was barred from requesting a last offer vote because first contract arbitration had been initiated. Specifically, the Union claimed that once first contract arbitration had been initiated, section 41(13) prohibited a strike or lock-out. Thus, the section 40 requirement that a vote request be made "before or after the commencement of a strike or lock-out" could not be fulfilled because no strike or lock-out was possible at the time of the request for the vote.

7. Upon receipt of the Union's objection, the Minister decided to postpone the vote arrangements until the matter could be referred to the Labour Relations Board.

8. The Minister is of the view that it would be appropriate to refer to the Labour Relations Board the question of whether to proceed with a request under section 40 given that first con-

tract arbitration under section 41 has been initiated, and given that there has not been a strike, nor can there now be a strike during first contract arbitration.

9. Pursuant to section 109 of the Act, the following questions are referred to the Labour Relations Board for its advice:

- (i) Are there circumstances arising out of applications made pursuant to sections 40 and 41 of the Act where the reasoning in *Isadore Roy Lumber Limited* OLRB Rep. Sept. 1233, would not apply?
- (ii) In light of the opening words of section 40, namely "before or after the commencement of a strike or lock-out", and given the recent Supreme Court of Canada's ruling in *R. v. McIntosh* Feb. 23, 1995 on the importance of the plain language interpretation of a statute, does section 41(13) act as a bar to requesting a last offer vote under section 40, where first contract arbitration has already been initiated?

10. The Minister requests that this matter be dealt with in as expeditious a manner as possible.

3. A hearing was held on March 8, 1995 to receive the parties' submissions on the issues raised by the reference. The facts relevant to the Board's determination are summarized in the Minister's reference. The provisions of the Act referred to by the parties in their submissions are as follows:

2.1 The following are the purposes of this Act:

- 1. To ensure that workers can freely exercise the right to organize by protecting the right of employees to choose, join and be represented by a trade union of their choice and to participate in the lawful activities of the trade union.
- 2. To encourage the process of collective bargaining so as to enhance,
 - i. the ability of employees to negotiate terms and conditions of employment with their employer,
 - ii. the extension of co-operative approaches between employers and trade unions in adapting to changes in the economy, developing work force skills and promoting workplace productivity, and
 - iii. increased employee participation in the workplace.
- 3. To promote harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions.
- 4. To provide for effective, fair and expeditious methods of dispute resolution.

...

39. Where, at any time after the commencement of a strike or lock-out, the Minister is of the opinion that it is in the public interest that the employees in the affected bargaining unit be given the opportunity to accept or reject the offer of the employer last received by the trade union in respect of all matters remaining in dispute between the parties, the Minister may, on such terms as he or she considers necessary, direct that a vote of the employees in the bargaining unit to accept or reject the offer be held forthwith.

40.- (1) Before or after the commencement of a strike or lock-out, the employer of the employees in the affected bargaining unit may request that a vote of the employees be taken as to the acceptance or rejection of the offer of the employer last received by the trade union in respect

of all matters remaining in dispute between the parties and the Minister shall, and in the construction industry the Minister may, on the terms that he or she considers necessary direct that a vote of the employees to accept or reject the offer be held and thereafter no further such request shall be made.

(2) A request for the taking of a vote, or the holding of a vote, under subsection (1) does not abridge or extend any time limits or periods provided for in this Act.

• • •

41.- (1) A first collective agreement shall be settled by arbitration in accordance with this section,

- (a) if a party to the negotiations requests first agreement arbitration in the circumstances described in subsection (1.2); or
- (b) if the Board makes a direction to that effect on an application under subsection (1.3).

• • •

(3) If first agreement arbitration is initiated, a board of arbitration composed of three members shall settle the first collective agreement between the parties.

• • •

(11) The board of arbitration appointed under this section shall determine all matters in dispute and release its decision within forty-five days of the commencement of its hearing of the matter.

• • •

(13) If first agreement arbitration is initiated, the employees in the bargaining unit shall not strike and the employer shall not lock-out the employees.

(13.1) If first agreement arbitration is initiated during a strike or lock-out, the employees shall forthwith terminate the strike and the employer shall forthwith terminate the lock-out.

• • •

(14) The requirement to reinstate employees applies despite the fact that replacement employees may be performing the work of employees in the bargaining unit, but subsection (13.1) does not apply so as to require reinstatement of an employee where, because of the permanent discontinuance of all or part of the business of the employer, the employer no longer has persons engaged in performing work of the same or a similar nature to work which the employee performed before the strike or lock-out.

(15) If first agreement arbitration is initiated, the rates of wages and all other terms and conditions of employment and all rights, privileges and duties of the employer, the employees and the trade union in effect at the time notice was given under section 14 shall continue in effect or, if altered before first agreement arbitration was initiated, be restored and continued in effect until the first collective agreement is settled unless the parties otherwise agree.

(16) Subsection (15) does not apply so as to effect any alteration in rates of wages or in any other term or condition of employment agreed to by the employer and the trade union.

(17) In arbitrating the settlement of a first collective agreement under this section, matters agreed to by the parties, in writing, shall be accepted without amendment.

(18) A first collective agreement settled under this section is effective for a period of two years from the date on which it is settled and it may provide that any of the terms of the agreement,

except its term of operation, shall be retroactive to the day that the Board may fix, but not earlier than the day on which notice was given under section 14.

• • •

(23) An application for a declaration that a trade union no longer represents the employees in the bargaining unit is of no effect if it is filed with the Board after first agreement arbitration is initiated unless it is brought after the first collective agreement is settled and it is brought in accordance with subsection 58(2).

(24) An application for certification by another trade union as bargaining agent for employees in the bargaining unit is of no effect if it is filed with the Board after first agreement arbitration is initiated unless it is brought after the first collective agreement is settled and it is brought in accordance with subsections 5(4), (5) and (6).

• • •

4. The union submits that the opening words of section 40, “[b]efore or after the commencement of a strike or lock-out”, combined with the operation of section 41(13), which prohibits a strike or lock-out following the initiation of first agreement arbitration, means that a final offer vote cannot be held following the initiation of first agreement arbitration. If, following first agreement arbitration, there can no longer be a legal strike or a lock-out, it can no longer be said to be a time period “before or after a strike or lock-out”. Hence, the precondition established by the opening words of section 40 cannot be met and a final offer vote is no longer available. Counsel submits that this result is mandated by the clear and plain meaning of the words of the statute.

5. The union argues that its position is consistent with the purpose of section 40 of the Act. Relying on *Wilson Automotive (Belleville Ltd.)*, [1980] OLRB Rep. Sept. 1337 and *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583, the union asserts that the purpose of section 40 is to provide for a final offer vote either during, or shortly before, a possible strike or lock-out. Given that section 41(13) operates to eliminate the possibility of a strike, and various subsections of section 41 stipulate that, once first agreement arbitration has been initiated the agreement “shall” be determined by the board of arbitration unless settled by the parties themselves (see 41(3), (11) and (18)), section 40 has no application. The union submits that, to permit a final offer vote in such circumstances would disrupt the first agreement arbitration process and could only serve to improperly influence the board of arbitration. Results which are contrary to the purposes of the Act as set out in section 2.1.

6. The union argues that *Isadore Roy, supra*, is either distinguishable on its facts, as the request for a final offer vote preceded the initiation of first contract arbitration, or, is incorrect as a matter of law.

7. The employer also takes the position that the opening words of section 40 are plain and unambiguous. It submits, however, that they do not impose any restriction on the application of the section, but rather, are the equivalent of “at any time”. The employer submits that *Isadore Roy, supra*, is determinative of the issue.

8. In support of its submissions, the employer points to the chronology of the enactment of various provisions. Section 39 of the Act, which permits the Minister to require a vote “at any time after the commencement of a strike or lock-out” was enacted in 1975. Section 40 was enacted (as section 34(e)) in 1980. The opening words of section 40 are thus in contrast to those of section 39. The words are not intended to constitute a precondition but rather a clarification that the restriction specified in the case of a Ministerial vote does not exist in the case of an employer requested vote. The employer further relies on the fact that section 41 was enacted (as section 40a) in 1986

and amended in 1992. Notwithstanding the existence of section 40 at the time of the enactment of section 41, the Legislature did not provide that section 40 was not available once section 41 had been invoked. Had the Legislature wished to do so, it would have used language similar to that utilized in sections 41(23) and (24). The employer submits that, not only does the Act not restrict a final offer vote following the invocation of section 41, but section 41(15) specifically preserves all rights of the employer in effect at the time notice to bargain was given inclusive of the right to request a final offer vote.

9. The employer submits that both sections 40 and 41 are tools for resolving bargaining impasse and that there is nothing inconsistent with both proceeding simultaneously. A final offer vote is simply a step in the bargaining process. It is possible that a final offer vote may have the effect of resolving a collective agreement more expeditiously than first agreement arbitration. In the employer's submission, the only circumstance in which a final offer vote could not be held following the initiation of first agreement arbitration would be where, pursuant to section 41(18), a first agreement had been settled by the board of arbitration.

10. In response, the union argues that section 41(15) must be read in the context of sections 41(13) and (14). Section 41(15) does not preserve all rights *in toto* but only those rights relating to terms and conditions of employment. In support, the union relies on the similarity in language between sections 41(15) and 81. The union submits that the Legislature was not required to specifically state that section 40 could not be invoked following the initiation of first agreement arbitration as the opening words of section 40 combined with section 41(13) render such an amendment unnecessary.

11. The first question posed by the Minister is whether there are circumstances in which the reasoning in *Isadore Roy, supra*, would not apply. As indicated by the summary of counsel's argument set out above, it appeared to the parties, as it does to the Board, that the real question the Minister wishes to have resolved is, as indicated by paragraph 8 of the Minister's reference, whether an employer can request a vote under section 40 after first agreement arbitration under section 41 has been initiated. Having carefully considered the parties' submissions on this issue, it is our view that the Board's reasoning in *Isadore Roy, supra*, is not applicable in such circumstances. The reasons for our determination are as follows.

12. We are not persuaded that the opening words of section 40 are the equivalent of "at any time". Such a construction would mean that an employer could request a final offer vote after the terms of a collective agreement had been settled when clearly it could not. The section is, at a minimum, restricted to periods when the parties are engaged in collective bargaining and thus cannot be invoked "at any time".

13. In our view, the opening words of section 40 contemplate the availability of strike or lock-out activity and thus establish a precondition to an employer's right to request a final offer vote. Strike or lock-out activity must be available to the parties in order for an employer to request a vote under section 40. By operation of section 41(13), once first agreement arbitration has been initiated, strike or lock-out activity is no longer possible, thereby foreclosing the employer from requesting a final offer vote.

14. We are confirmed in our view of the meaning of the opening words of section 40 by the section's purpose. As the Board has commented in *Wilson Automotive, supra*, and *Canada Cement Lafarge Ltd., supra*, the purpose of section 40 is to minimize industrial conflict. Section 40 is a mechanism for avoiding or ending a strike or lock-out. Once first contract arbitration has been initiated a strike or lock-out is no longer possible. The operation of section 41 eliminates the industrial conflict which section 40 is intended to minimize. Thus, following the initiation of first con-

tract arbitration, a final offer vote no longer serves the purpose for which it was intended. Section 41 mandates that, once first contract arbitration has been initiated, the agreement shall be settled by the board of arbitration. In such circumstances, a final offer vote can only serve to disrupt the workplace, relations between the parties, and the first contract arbitration process, without serving any useful purpose.

15. To the extent that our reasoning may be seen as a departure from that given by the Board in *Isadore Roy*, we note that the facts in issue in that case, were such that the final offer vote request was received by the Minister *before* the request for first contract arbitration. Thus, its comments about the absence of any scheme of priority as between the two types of requests must be seen as *obiter*. Further, we note that the argument advanced by the union in the instant case does not appear to have been before the Board in *Isadore Roy*.

16. On the basis of the foregoing, we answer the Minister's questions as we understand them to relate to the facts presently in issue, as follows:

9. (i) The reasoning in *Isadore Roy*, *supra*, does not apply when a vote is requested under section 40 of the Act after first contract arbitration under section 41 of the Act has been initiated.
- (ii) We do not view the Supreme Court of Canada's ruling in *R. v. McIntosh*, Feb. 23, 1995 as of assistance to us. Where, as a result of the operation of section 41(13), a strike or lock-out is not legally possible, section 40 cannot be invoked due to the fact that the precondition to its operation, namely the availability of strike or lock-out activity, cannot be fulfilled.

1826-93-R; 3087-93-R; 3985-93-G Labourers' International Union of North America, Local 183, Applicant v. **The Georgian Construction Company Limited**, Responding Party; Labourers' International Union of North America, Local 183, Applicant v. The Georgian Construction Company Limited, The Georgian Group Inc., Cresmark Construction Limited and Krestmark Development Corporation, Responding Parties; Labourers' International Union of North America, Local 183, Applicant v. The Georgian Group, Responding Party

Construction Industry - Related Employer - Board not accepting submission that "GC" and "GG" not carrying on related activities because "GC" involved in non-profit housing and "GG" active in single family homes - Board finding both companies active in residential sector of construction industry - Board rejecting submission that "GC" and "GG" not under common control and direction where "GG" is wholly owned by "F" and "A", and where "F" and "A" have legal ability to control "GC" through power to vote majority of shares of company owning "GC".-Related employer declaration issuing

BEFORE: D. L. Gee, Vice-Chair, and Board Members F. B. Reaume and H. Kobryn.

APPEARANCES: *John Moszynski, Rocco Lotito, Antonio Pinto and Keith Cooper* for the applicant; *James G. Knight and Gene Maida* for The Georgian Construction Company Limited; *William Clunie* for The Georgian Group Inc.; *G. Dimitriou and Nick Maida* for Cresmark Construction Limited; *Gene Maida* for Krestmark Development Corporation.

DECISION OF THE BOARD; March 1, 1995

1. The name of the responding parties in Board File No. 3087-93-R is amended to read: "The Georgian Construction Company Limited, The Georgian Group Inc., Cresmark Construction Limited and Krestmark Development Corporation".

2. Board File No. 1826-93-R is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act* (the "Act") in response to which The Georgian Construction Company Limited asserts that it did not employ any labourers on the date of application as the labourers working on its job sites were employees of The Georgian Group Inc. Board File No. 3985-93-G is a referral of a grievance to arbitration under section 126 of the Act. Board File No. 3087-93-R is an application pursuant to section 1(4) of the Act. The application for certification and the grievance were adjourned pending the outcome of the section 1(4) application.

3. There is little dispute as to the facts and accordingly we have briefly summarized only those facts relevant to our determination.

4. The Maida family is extensively involved in the construction industry. Members of the Maida family have interests, individually and in combination with one another or arms-length entities, in numerous commercial entities which are involved in various aspects of the construction industry.

5. The Georgian Group Inc. ("Georgian Group") acts as a project management company in connection with the building of single family homes. Georgian Group initially operated as a trade name and was eventually incorporated on June 10, 1981. The applicant, Labourers' International Union of North America, Local 183 ("Local 183") was certified to represent the construction labourers in the employ of Georgian Group on residential construction, subject to specified exemptions, on December 28, 1977. Georgian Group has never been involved in the construction of ICI projects or non-profit housing.

6. Two Maida brothers, Frank and Anthony, are the directors of Georgian Group. The third Maida brother, Gene, has been a signing officer and the treasurer of Georgian Group since 1989. Gene is a signing officer solely for the purpose of signing cheques and all such cheques must be counter-signed by the Vice-President of Georgian Group, Mr. William Clunie. Gene owns no shares of Georgian Group and derives no income from Georgian Group. There is no evidence of Gene having any direction or control over Georgian Group.

7. The Georgian Construction Company Limited ("Georgian Construction") has carried on business since 1985. Georgian Construction acts as a construction manager or a design build contractor. The sole director and officer of Georgian Construction is Gene Maida. Anthony Maida and William Clunie are authorized signing officers.

8. Georgian Construction is wholly owned by Georgian Development Corporation which is owned in equal shares by Gen Drain Holdings Inc., Gen Drain Properties Inc., and Glenbrooke Holdings. Gen Drain Holdings Inc. and Gen Drain Properties Inc. are trusts which have been set up for the children of Frank and Anthony Maida. Frank and Anthony have the power to vote the shares of Gen Drain Holdings Inc. and Gen Drain Properties Inc. The shares have been voted on

no more than one occasion. Glenbrooke Holdings is Gene Maida's holding company. Glenbrooke Holdings has been hired by the three shareholders of Georgian Development Corporation to manage Georgian Construction. Glenbrooke Holdings is paid a fee for managing Georgian Construction and each year Glenbrooke Holdings pays Gene Maida a salary.

9. From 1985 to 1990 Georgian Construction operated only in the ICI sector of the construction industry. Although Georgian Construction obtained approximately 25 percent of its ICI construction work from companies which were controlled by Maida family members or in which Maida family members had an interest, the evidence establishes that Georgian Construction's ability to attract and obtain ICI construction work was largely due to the initiative and hard work of Gene Maida. The evidence further establishes that the employees and sub-trades of Georgian Construction were hired or retained by Gene Maida without any assistance or involvement of other Maida family members.

10. In or about 1990, with the onset of the recession, ICI construction industry work became sparse. Accordingly, Georgian Construction, through the efforts of Gene Maida, began to seek out alternative sources of income. Once again, the evidence establishes that it was by virtue of the hard work and initiative of Gene Maida that Georgian Construction was able to break into the area of non-profit housing. It is in the area of non-profit housing that Georgian Construction has been engaged for the past several years.

11. The first non-profit housing contract which Georgian Construction was successful in obtaining is known as the Amesbury Residences project. Georgian Construction was engaged on the Amesbury Residences project from June, 1991 to September, 1992.

12. Subsequent to the Amesbury Residences project Georgian Construction was successful in obtaining a contract for a non-profit housing project known as the Hope Villa project. Georgian Construction was engaged on the Hope Villa project from May, 1993 to September, 1993.

13. No other Maida family company had any involvement with any aspect of either the Amesbury Residences or Hope Villa projects and we accept that Georgian Construction was successful in obtaining these contracts based purely on its own abilities.

14. In May, 1993 Georgian Construction also commenced work on its third non-profit housing project known as the Scarlett Road project. The land on which this project was built was originally acquired and owned by a company owned by Maida family members. The mortgage on the land was in default and accordingly Gene Maida recommended that the land be sold to the Ministry of Housing. It was not a condition of the sale of the land to the Ministry of Housing that Georgian Construction would be awarded the contract to build the non-profit housing on that site. Georgian Construction was, however, successful in obtaining the contract in question. Georgian Construction was engaged on the Scarlett Road project from May, 1993 to May, 1994.

15. Georgian Construction does not employ construction labourers. Accordingly, on the Amesbury Residences, Hope Villa and Scarlett Road projects, Georgian Construction borrowed labourers from Georgian Group. Georgian Construction obtained quotes from three companies for the provision of labour before accepting the quote submitted by Georgian Group. Georgian Group agreed to loan labour to Georgian Construction at its cost (wages plus benefits and remittances) plus one dollar per hour. In early 1993, the labourers loaned to Georgian Construction by Georgian Group were paid on Georgian Construction cheques. The evidence establishes that, earlier in 1993, Georgian Group ran out of blank pay cheques. Georgian Construction had a stock of pay cheques bearing its name which it no longer required as Georgian Construction no longer had an active payroll. Mr. Clunie decided to use up Georgian Construction's stock of pay cheques while

awaiting new Georgian Group cheques. Although the individuals were paid on cheques bearing the name Georgian Construction, the funds in the account in question were those of Georgian Group such that Georgian Group was in fact paying the employees. Georgian Group would then invoice Georgian Construction for the amount agreed upon and Georgian Construction paid Georgian Group.

16. In September, 1993 Gene Maida negotiated a building contract for a non-profit housing project, known as the Upper Middle Road project, on behalf of Cresmark Construction Limited ("Cresmark"). Gene Maida's nephew, Nick Maida, is the sole officer and director of Cresmark. The Upper Middle Road project came about as a result of contacts made by Gene Maida in the non-profit housing area. Although Gene Maida was capable of building the project with Georgian Construction, he saw the project as an opportunity to give his nephew experience as a general contractor. Cresmark, similar to Georgian Construction on the previous non-profit housing projects, borrowed construction labourers from Georgian Group.

17. Georgian Group and Georgian Construction have the same address. Their offices are located in adjoining suites. Georgian Construction rents its office space and certain office services from Georgian Group. The office services provided by Georgian Group include use of a shared receptionist, telephone system and financial management services including a single payroll, although not the day-to-day bookkeeping and accounting. Georgian Construction employees have access to cafeteria and washroom facilities that are shared with Georgian Group employees. Georgian Construction has the services of William Clunie available to it. Georgian Construction is charged a service fee by Georgian Group for the services provided including the use of Mr. Clunie's time.

18. In the fall of 1983, Mr. Clunie assisted Gene Maida in obtaining a \$750,000 bond. Gene was able to secure the bond based on his own net worth which was derived from his interest in a family company. Mr. Clunie did not charge Gene Maida for his assistance but rather did it as a personal favour.

19. In March, 1986 Georgian Development Corporation (and hence the shareholders thereof) injected \$150,000 into Georgian Construction. In November, 1991, in order to permit Georgian Construction to obtain a 12 million dollar bond, Georgian Development Corporation injected a further \$850,000 into Georgian Construction. Gene Maida served as a personal guarantor in order to secure the 12 million dollar bond. Given the timing of the cash infusion, it is reasonable to infer that the bond in question was required by Georgian Construction with respect to one of its non-profit housing projects.

20. "Georgian" was deliberately used by Gene Maida in the name of Georgian Construction. Gene Maida wanted to capitalize on any goodwill which may have been associated with the name. The evidence establishes that there is an element of confusion in the eye of some of the sub-trades which deal with Georgian Construction as to its identity separate and apart from Georgian Group.

21. The evidence with respect to Krestmark Development Corporation ("Krestmark") was extremely limited. The evidence establishes that Krestmark is not a construction company and has never had any employees working as construction labourers nor does there appear to be any potential for it to do so in the future. The sole purpose of Krestmark is to hold a majority interest in a plaza in Markham, Ontario. The Board is satisfied that Krestmark is not associated or related to Georgian Group and accordingly, on such basis, dismisses the section 1(4) application as against Krestmark Development Corporation.

22. The evidence with respect to Cresmark establishes that it is a general contractor in the construction industry. Its sole activities to date have been to act as the general contractor on the Upper Middle Road project and to bid on other projects without success. As indicated above, Cresmark secured the contract for the Upper Middle Road project as a result of the efforts and benevolence of Gene Maida. The performance bond for the Upper Middle Road project was issued by Cresmark directly through the existing bond facility of Georgian Construction. Cresmark does not deny that it is related to Georgian Construction. It takes the position, however, that it cannot be related to Georgian Group unless Georgian Construction is so found, and supports Georgian Construction in its position that it is not related to Georgian Group.

23. Section 1(4) of the Act provides as follows:

1. . . .

(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

24. In order for the Board to declare Georgian Group and Georgian Construction to constitute one employer for the purposes of the Act, section 1(4) requires that they constitute two or more entities which carry on associated or related activities or businesses under common control or direction. Upon finding such preconditions to have been met, the Board has a discretion to refuse to grant such a declaration as it may deem appropriate.

25. Counsel for Georgian Construction denies that Georgian Construction and Georgian Group are carrying on associated or related activities or businesses or are under common direction or control. In the alternative, it is submitted that the Board should exercise its discretion and refuse to declare Georgian Construction and Georgian Group to be one employer for the purposes of the Act.

26. It is submitted on behalf of Georgian Construction that Georgian Construction and Georgian Group serve two distinct markets and that there is no overlap in their activities. Georgian Construction presently acts as a general contractor in the area of non-profit housing. Georgian Construction has obtained access to this market as a result of the efforts of Gene Maida. It has no plans of becoming active in the area of single family homes. In contrast, Georgian Group is solely engaged as a project manager with respect to the building of single family homes. Georgian Group has no experience in the area of non-profit housing and lacks the expertise and contacts necessary to break into this area. Thus, it is submitted that Georgian Group and Georgian Construction do not carry on associated or related activities or businesses.

27. The Board has interpreted the words "associated or related activities or businesses" in a manner consistent with the broad remedial purpose of subsection 1(4). In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 the Board stated as follows:

15. . . . The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different or corporate vehicles and are not carried on simulta-

neously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

28. Later, in *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720 the Board commented on the scope of the terms "associated" and "related" as follows:

20. Given the remedial thrust of section 1(4) and the broad language chosen by the Legislature ("associated" or "related", "activities" or "businesses"), it is apparent that the section was intended to apply to a wide variety of commercial activities, even when an employer's main or principal business concern may be something else. That was the opinion of the Board in *Elmont Construction Limited*, [1974] OLRB Rep. June 342 (application for judicial review dismissed, *sub nomine, Elmont Construct Limited and Bruce Huntley Contracting Limited v. Toronto Building and Construction Trades Council et al.*, 75 CLLC ¶14,270), and it is one with which we respectfully agree. The fact is, that a firm engaged in the construction business can, with relative ease, become involved, from time to time, in various sectors, subdivisions, phases, or specialized kinds of construction work, depending largely upon the business opportunities which present themselves, and we do not think we should readily hold that those activities are "unrelated" - particularly if they are being undertaken at the same time and involve common managerial or employee skills. . . .

29. As submitted by counsel for Georgian Construction, the evidence establishes that Georgian Construction has created a niche for itself in the area of non-profit housing, whereas Georgian Group is active only in the area of single family homes. We do not, however, view such activities, when viewed in the context of the construction industry, as being unrelated. Both companies are active in the residential sector of the construction industry. As the definition of sector (set out in section 119 of the Act) indicates, residential projects share similar work characteristics. As a result, it would be relatively simple for a contractor engaged in one aspect of residential construction to refocus its efforts, and by utilizing the same employees and suppliers, become active in another aspect of residential construction. Counsel submits that Georgian Group lacks the necessary expertise to break into the non-profit housing industry. That, however, is not the Union's concern. The Union's concern is Georgian Construction's entry into residential construction, which has already occurred and could easily spread to the area of single family homes. In our view, Georgian Construction and Georgian Group carry on associated or related activities or businesses in that they are both active in the residential sector of the construction industry.

30. With respect to issue of common direction or control, counsel for Georgian Construction submits that the evidence establishes that Anthony and Frank Maida direct and control Georgian Group and that Gene Maida directs and controls Georgian Construction such that the two are not under common direction or control. Counsel submits that the fact that Frank and Anthony have the ability to vote two-thirds of the shares of Georgian Development Corporation does not mean that they are in control of Georgian Construction as the evidence establishes that the shares have been voted, at most, on one occasion.

31. The Board is satisfied that Frank and Anthony Maida direct and control Georgian Group and that Gene Maida has no involvement in the affairs of Georgian Group. The Board is further satisfied that Gene Maida directs the day-to-day operations of Georgian Construction. The Board is not satisfied, however, that Georgian Construction is not also under the control of Frank and Anthony Maida.

32. The evidence establishes that Georgian Construction is wholly owned by Georgian Development Corporation. Georgian Development Corporation is in turn owned by three equal shareholders, two trust companies set up for the children of Frank and Anthony Maida and Gene Maida's holding company. Frank and Anthony Maida vote the shares held by the trust companies

set up for their respective children. Frank and Anthony Maida thus have the legal authority and power to vote the majority of the shares of Georgian Development Corporation.

33. The evidence further establishes that Gene Maida's company, Glenbrooke Holdings, was appointed by the shareholders of Georgian Development Corporation to manage Georgian Construction. Thus, Gene Maida presently manages Georgian Construction as a result of the appointment of his company by the majority of the shareholders. Frank and Anthony, through their ability to vote the majority of the shares in Georgian Development Corporation, have the ability to terminate Glenbrooke Holding's management contract and hence Gene Maida's day-to-day control over Georgian Construction.

34. The evidence further establishes that the capital required to start up Georgian Construction was invested by the shareholders of Georgian Development Corporation. The sum of \$150,000 was invested in Georgian Development Corporation in 1986. Then, in 1991, when Georgian Construction was endeavouring to enter the area of non-profit housing, a further \$850,000 was injected into Georgian Development Corporation. The funds were required in order for Georgian Construction to acquire a bond necessary to bid on a non-profit housing project. Thus, the capital utilized by Georgian Construction to start up its operations, and the capital necessary in order to acquire a bond which assisted Georgian Construction's entry into the area of non-profit housing, was contributed in large part by the trust companies set up for the children of Frank and Anthony Maida. The sum of money contributed by each shareholder in Georgian Development Corporation, namely \$333,333.00, is not insignificant, and it is reasonable to assume that, absent such cash injections, Georgian Construction would not have obtained the bond in question or been as successful as it has been in the area of non-profit housing.

35. Counsel for Georgian Construction submits that the Board should look beyond the fact that Frank and Anthony Maida, as the individuals who have the power to vote the majority of the shares of Georgian Development Corporation, have the legal ability to control Georgian Construction, and consider who in fact is controlling Georgian Construction. As indicated above, the evidence establishes that the shares have been voted, if at all, on one occasion. Counsel thus submits that, whatever may be the legal construct, it is evident that Gene Maida is controlling Georgian Construction without accountability to the shareholders. We do not agree.

36. The Board discussed the meaning of "control" or "direction" of a company for the purposes of section 1(4) in *Jen-Ry Utility Construction Company Limited*, [1984] OLRB Rep. Dec. 1724 as follows:

16. All of these cases make it clear that the test for "control" under section 1(4) of this Act envisions the ultimate power to "call the shots" where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a "related employer" for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example say "yes" or "no" to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g., *Great Atlantic & Pacific Company Limited*, *A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms (e.g. *J. H. Normick, Foley, supra*, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945), or it may come from a combination of the two, (*Kennedy Lodge*, *supra*, *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214.)

37. As the above quote indicates, the Board looks to determine where the *ultimate power* to

make decisions concerning labour relations resides and not simply the authority to direct the employees' activities. In our view, the *ultimate power* to make decisions with respect to Georgian Construction resides with the shareholders of Georgian Development Corporation and not with Gene Maida. The shareholders of Georgian Development Corporation exercised such power when they appointed Glenbrooke Holdings to manage Georgian Construction. The fact that the shareholders have not since interfered with the management of Georgian Construction by Glenbrooke Holdings may simply indicate that they have thus far approved of the company's management and does not lead to the conclusion that they are not in control of Georgian Construction. The fact is, if circumstances changed, and Frank and Anthony Maida felt a need to appoint officers, directors or a new management company to operate Georgian Construction, they have the power to do so. In light of their considerable investment in Georgian Development Corporation, such a development is not beyond the realm of possibility. Thus, notwithstanding Gene Maida's day-to-day management of Georgian Construction, ultimate power resides with the shareholders of Georgian Development Corporation.

38. As a result, it is our conclusion that Georgian Group is controlled by Frank and Anthony Maida and that Georgian Construction is controlled by the shareholders of Georgian Development Construction, two-thirds of whose shares are voted by Frank and Anthony Maida. Georgian Construction and Georgian Group are thus under common direction or control.

39. Having found that Georgian Construction and Georgian Group are engaged in associated or related activities under common direction or control we turn to whether we should exercise our discretion and refuse to declare Georgian Construction and Georgian Group to constitute one employer for the purposes of the Act.

40. Section 1(4) is most often utilized by the Board to ensure that a union's bargaining rights are not eroded. Whether there has been an erosion of bargaining rights generally depends on whether, had the work been performed by the entity with respect to which the union has bargaining rights, the union's bargaining rights would have encompassed employees performing such work. In the present case, had the non-profit housing work performed by Georgian Construction been undertaken by Georgian Group, Local 183's bargaining rights would clearly have applied to such work.

41. Counsel for Georgian Construction suggests, however, that the activities of Georgian Construction have not eroded Local 183's bargaining rights as Georgian Group lacks the expertise and contacts necessary to work in the area of non-profit housing and hence lacks the means to do so.

42. We accept that, at the time Georgian Construction commenced work in the area of non-profit housing, that Gene's knowledge of the area exceeded that of Frank and Anthony. We do not accept that that meant that Georgian Group lacked the means to become active in the area of non-profit housing. The principals of Georgian Group, as is evidenced by their significant capital contribution into Georgian Development Corporation, saw non-profit housing as an attractive endeavour. They had the desire and the capital necessary to move into the area of non-profit housing. As is evidenced by Georgian Construction's loan of labour from Georgian Group, they also had a qualified workforce. What they lacked was the contacts and knowledge that Gene Maida had. While such may have been a factor in their deciding to inject sufficient capital into Georgian Construction to enable it to undertake the work as opposed to Georgian Group, we do not accept that this means Georgian Group was *unable* to move into the area of non-profit housing. In our view, it was possible for the principals of Georgian Group to either hire the necessary expertise or obtain it themselves and thereby enable Georgian Group to enter the area of non-profit housing. Rather,

they chose to invest in Georgian Construction and have Georgian Construction pursue such work. Their decision to do so meant a loss of potential work to Local 183's members.

43. With respect to counsel's suggestion that Local 183's bargaining rights have not been eroded because Georgian Construction has borrowed union labour from Georgian Group, we would point out that, if we were to decline to declare Georgian Construction and Georgian Group to be one employer for the purposes of the Act, there is nothing to prevent Georgian Construction from ceasing to borrow labour from Construction Group or another unionized contractor. The fact that it has done so thus far is no guarantee that it will continue to do so in the future. Further, the effect of a section 1(4) declaration is to bind Georgian Construction to Local 183's collective agreement with Georgian Group as if it were a party thereto. As a result, should we issue a section 1(4) declaration, Local 183 would be able to enforce the subcontracting provisions of its collective agreement as against Georgian Construction, which it is presently unable to do. Thus, we do not accept that the present arrangement, whereby Georgian Construction borrows labour from Georgian Group, means that Local 183's bargaining rights have not been eroded, or, at the very least, that there is no potential for Local 183's bargaining rights to be eroded.

44. In our view, the present scenario is one which section 1(4) was intended to apply to and we see no reason to decline to exercise our discretion to issue a section 1(4) declaration.

45. As indicated above, Cresmark acknowledged, and we so find, that it is related to Georgian Construction and that the Board's determination of whether it was related to Georgian Group follows the Board's determination with respect to Georgian Construction.

46. Accordingly, we hereby find that Georgian Construction, Georgian Group and Cresmark carry on associated or related activities under common control or direction and declare that, for the purposes of the Act, they are to be treated as constituting one employer. We further declare that Georgian Construction and Cresmark are bound to the collective agreement between Georgian Group and Local 183 as if they were a party thereto. The section 1(4) application as against Krestmark is dismissed.

47. The applicant is to advise the Registrar within 30 days of the date of this decision as to how it wishes to proceed with respect to Board File Nos. 1826-93-R and 3985-93-G.

48. This panel is seized.

**1177-94-R Hotel, Motel and Restaurant Employees' Union, Local 442, Applicant
v. The Niagara Parks Commission, Responding Party**

Bargaining Unit - Certification - Crown Employees Collective Bargaining Act - Union applying to represent all waiters/waitresses employed by employer in City of Niagara, which would include 3 of 4 restaurants operated by employer - Employer proposing unit of all waiters/waitresses employed in Regional Municipality of Niagara, which would include all 4 of employer's restaurants - Board finding union's proposed bargaining unit appropriate

BEFORE: *Jerry Kovacs*, Vice-Chair.

APPEARANCES: *M. Kronick* and *James A. Whyte* for the applicant; *Catherine Peters* and *B. McIlveen* for the respondent party.

DECISION OF THE BOARD; March 8, 1995

1. This is an application for certification. The name of the responding party is hereby amended to read: "The Niagara Parks Commission".
2. The parties dispute the description of the bargaining unit of employees that is appropriate for bargaining. In particular, they disagree on the appropriate geographic scope. The applicant proposes a unit of all servers (i.e., waiters and waitresses) "in the City of Niagara Falls". That unit would encompass only three of the four restaurants operated by the responding party ("the Commission"). The Commission proposes a unit of all servers "in the Regional Municipality of Niagara", with a clarity note to expressly include the restaurant operated by the Commission in the Town of Niagara-on-the-Lake as well as the three restaurants in Niagara Falls.
3. The applicant argues essentially that it has proposed a viable bargaining unit that conforms with the Board's established practice of reference to a single municipal area, and that a unit extending beyond Niagara Falls would impede employee access to collective bargaining. The Commission argues essentially that the restaurants in Niagara-on-the-Lake and Niagara Falls are functionally integrated, that the applicant's proposed unit would cause undue fragmentation, and that the special nature of the Niagara Parks Commission creates exceptional circumstances that should lead the Board to depart from its usual practice of single-municipality unit descriptions.
4. This is the Niagara Parks Commission's first experience within the rules of the *Labour Relations Act*, pursuant to provisions of the recently enacted *Crown Employees Collective Bargaining Act, 1993* (the "new CECBA"). Its counsel highlighted this change in collective bargaining regimes, and suggested that statutory and regulatory history should be an important factor governing the Board's determination in this case.

Statutory Framework

5. The Niagara Parks Commission is an agent of the Crown. Prior to the enactment of the new CECBA and to recent amendments to the definition of "Crown employee" in the *Public Service Act*, this meant that the Commission and its employees were governed by the terms of the old CECBA and not by the *Labour Relations Act*. Indeed, the Board dismissed an application for certification by the Civil Service Association of Ontario in respect of the Niagara Parks Commission for that reason (see *The Niagara Parks Commission*, [1966] OLRB Rep. Apr. 41).
6. The old CECBA differed significantly from the *Labour Relations Act*. For instance, in

addition to the standard right of employee self-organization (with provision for adjudication of bargaining unit description), it allowed the Lieutenant Governor in Council to designate any employee organization as the exclusive bargaining agent of a bargaining unit of any description (see old *CECBA* ss. 2-3). The old Act also allowed the Crown to designate a bargaining representative in respect of a Crown agent (see s. 1(2)).

7. In accordance with those provisions, certain Regulations designate the Ontario Public Service Employees Union ("OPSEU") as exclusive bargaining agent in respect of two bargaining units at the Niagara Parks Commission: (i) the "parks employees" unit, consisting of all employees other than Police Department employees, part-time employees and seasonal employees, and (ii) the "police employees" unit, consisting of all employees of the The Niagara Parks Commission Police Department, other than seasonal employees (see R.R.O, Reg. 258). Neither bargaining unit description makes any reference to geographic scope; therefore, both of the designated bargaining units are "park-wide". In addition, the Niagara Parks Commission is designated as employer representative of the Crown for purposes of collective bargaining.

8. Despite the exclusion of seasonal employees from the Regulation's bargaining unit description for "parks employees", the Commission and OPSEU eventually negotiated a collective agreement that includes almost all seasonal employees. Apart from the expected managerial, part-time and student exclusions, the only other category of seasonal employees now excluded from the agreement are "waiters and waitresses", i.e., the "servers" who are the subject of this application. All of the servers are seasonal employees. (I note that the parties did not dispute that servers are seasonal employees within the meaning of the *Public Service Act* and Regulations thereunder. These "seasonal" employees might work fifty weeks in a calendar year).

9. As with old *CECBA*'s regulatory treatment of the Niagara Parks Commission bargaining units, there is no reference to geographic scope in the bargaining units designated by way of Regulation in respect of twenty-one ambulance services; and the same is true of bargaining units at the Liquor Control Board of Ontario and the Liquor Licence Board of Ontario (again, see R.R.O., Reg. 258). However, the designated unit description in respect of the Ontario Housing Corporation excludes the Municipality of Metropolitan Toronto. (Apparently, the employees within the Municipality of Metropolitan Toronto are represented by a bargaining agent that obtained bargaining rights in some manner other than by Regulatory designation.)

10. Apart from these collective bargaining relationships established under Regulation (and the unsuccessful certification effort by OPSEU's predecessor in 1966), it would appear that the Niagara Parks Commission and its employees had no other experience of employee organization under the old *CECBA*. In other words, there has never been an organizing drive related to an application for certification (or its equivalent under the old *CECBA*). The Commission has never been required to litigate issues of bargaining unit description.

11. The relevant provisions of new *CECBA* came into force in February, 1994. The enacting legislation amended the *Labour Relations Act* such that it now binds the Crown. The new *CECBA* sets out certain modifications to the operation of the *Labour Relations Act* in respect of its application to Crown employees, none of which are relevant to this case. (In any event, there is some question regarding the "Crown employee" status of Commission employees. Recent amendments to the *Public Service Act* changed the definition of "Crown employees" to include employees of only those Crown agents designated in Regulation. Since no such Regulation is apparent, it may be that the Niagara Parks Commission employees are not "Crown employees". As a result the *Labour Relations Act* may itself govern them, rather than that Act as modified by new *CECBA*.) Accordingly, the parties in this matter are subject to the usual *Labour Relations Act* provisions

governing certification, including the requirement under subsection 6(1) that the Board determine the unit of employees that is appropriate for collective bargaining in an application for certification.

12. Transitional provisions in the new *CECBA* provide some stability for the Commission's existing collective bargaining relationships with OPSEU. The relevant provisions are as follows:

54.-(1) A unit of employees that was a bargaining unit under the old Act immediately before the repeal of that Act is an appropriate bargaining unit for the purposes of the *Labour Relations Act* until the description of the bargaining unit is altered under the *Labour Relations Act*.

(2) Despite the *Labour Relations Act*, the description of a bargaining unit referred to in subsection (1) cannot be altered until after a collective agreement is made following the coming into force of this section.

...

55. A bargaining agent that, immediately before the repeal of the old Act, represented employees in a bargaining unit to which section 54 applies continues to represent them, for the purposes of the *Labour Relations Act*, until the bargaining agent cease, under that Act, to represent them.

Structure of the Niagara Parks Commission

13. The Commission itself was established by statute over one hundred years ago. The current *Niagara Parks Act* defines the "Parks" so as to span *three* municipalities (the Town of Niagara-on-the-Lake, the City of Niagara Falls, and the Town of Fort Erie). In furtherance of the Commission's duty "to manage, control and develop the Parks", the Act empowers the Commission to conduct a wide variety of enterprises, including the construction and operation of "restaurants, refreshment booths and stands for the sale of souvenirs". For governance, the Commission must include one member who is a member of the council of the Regional Municipality of Niagara, and a member from each of the Town/City councils of Niagara-on-the-Lake, Niagara Falls and Fort Erie.

14. The Commission is a financially self-sustaining organization (like certain other Crown agents, including the Liquor Boards) that receives no form of transfer payments from the provincial government. It gathers some revenue through rental payments from power companies in the Parks. However, it was not disputed that the Commission's largest source of revenues is its operation of restaurants, snack bars, gift shops and tourist attractions. There are approximately thirty of these sorts of facilities.

15. Approximately 1600 people are employed by the Commission, although that number fluctuates with the seasons. As noted above, two collective agreements govern a portion of the work-force. The OPSEU unit of "parks employees" is subject to a two-part collective agreement; Part "A" covers "regular employees" (full-time workers), of whom there are about 240, while Part "B" covers "seasonal employees", of whom there are between 500-600. The second OPSEU unit covers "police employees". The balance of the Commission's work-force - not subject to collective bargaining - is comprised of supervisors, students, part-timers and, finally, the servers.

16. The Commission has three pay equity plans. There are separate plans for each of the bargaining units and a third plan governs non-bargaining unit employees (i.e., managers, part-time employees, and the servers).

17. The Commission has subdivided its operations into ten departments, including Retail

Operations (souvenirs, gift shops), Food Services (which includes the restaurants), Horticulture, Engineering, Police, Public Relations, Finance, Planning and Development, and Human Resources. Each Department is managed by a Director. In the case of the Food Services Department, the Director reports to the Assistant to the General Manager of the Commission.

18. The Food Services Department operates the four "full service" restaurants that are the subject of this application. Only the restaurants employ servers. However, the Food Services Department includes much more than the restaurants. There are also two fast food stores, one cafeteria and "numerous" snack bars (up to eleven) operated throughout the park system. Each of the Department's various facilities has a manager who reports to the Director of the Food Services Department. A Co-ordinator of Food Services is responsible for all facilities. An Executive Chef, reporting to the Director, is responsible for the menus in all facilities.

19. The existing OPSEU "parks employees" collective agreement affects the facilities operated by the Food Services Department. As noted, the agreement excludes only students, part-time workers, and the restaurant servers. As a result, some Food Services Department facilities employ both bargaining unit and non-bargaining unit employees. This is the case in each of the four restaurants, where the servers work along side bargaining unit employees including bus help, cooks, cashiers, bartenders, janitorial staff, and office help.

20. This mix of bargaining unit and non-bargaining unit seasonal employees has existed in the restaurants since about 1987. It was then that the Commission and OPSEU agreed to expand the scope of the "parks employees" collective agreement. The agreement was amended to contain an additional set of terms and conditions of employment to govern all of the Commission's seasonal employees, with the exception of the restaurant servers. The evidence before me offers no explanation for the continued exclusion of servers.

21. There are no unique provisions of the collective agreement in respect of Food Services Department employees. They are governed by the same terms and conditions of employment that apply to hundreds of other Commission employees performing differing work in a variety of separate Departments.

Management of the Restaurants

22. Three of the four restaurants are in the City of Niagara Falls. The "flagship" restaurant is Table Rock, located at the brink of the Canadian falls. Less than one-quarter mile to the north is the Victoria Park restaurant, across from the American falls. Continuing en route towards Niagara-on-the-Lake, the next restaurant is Diner on the Green, located at the Whirlpool Golf Course (about 5 miles from Table Rock and Victoria Park). Although these three restaurants are within the City of Niagara Falls, Diner on the Green is very close to the Town boundary of Niagara-on-the-Lake. About one to two miles to the north of the Diner on the Green - and over the municipal boundary into the Town of Niagara-on-the-Lake - is the Queenston Heights restaurant.

23. Only Table Rock (the largest of the restaurants) is open year-round'; it operates on reduced hours in the off-seasons'. Victoria Park is open each year between about April and Thanksgiving. Diner on the Green opens in March or April until the end of October. Queenston Heights opens from about the beginning of April until the end of December. At each restaurant, the daily hours of operation may vary from season to season or from month to month. Although schedules may be consistent in the peak summer months, there is, generally, a flexible approach that permits adjustment of hours of operation to meet current trends in customer demand at each location. In addition, a restaurant may open at other times, or may expand its usual staff (about which more is said below), to accommodate a special function or banquet.

24. Servers perform virtually the same work regardless of restaurant location. There is no difference in skill requirements based on restaurant location. Although terms and conditions of employment are the same for all servers, this is to some extent true for all seasonal employees of the Commission. For instance, all servers are hired on a "seasonal basis", such that each is required to execute a new employment contract each year (though there are instances where this requirement has been missed inadvertently). The contract is a standard one, common to all of the Commission's hundreds of seasonal employees, i.e., with no terms specific to restaurant employment.

25. Although the restaurants are not intended to target different clientele, there are differences in decor, price structure and menu. Queenston Heights tends to be more formal. And although all servers wear uniforms, the uniform differs from restaurant to restaurant. In short, the restaurants are not standardized along the lines of fast-food chain restaurants in the private sector'.

26. Each restaurant has a manager or supervisor who must report to the Director of Food Services. The manager is responsible for staffing and for the viability of the particular restaurant. The manager sets operating targets, activity targets and productivity targets; these are reviewable by the Director. Each manager sets the employee schedule for her or his restaurant. That schedule is subject to the Director's approval, and the Director changes the schedule if it does not meet the productivity target for the restaurant. The Director is responsible for determining each restaurant's hours of operation, but he does so in consultation with the restaurant manager. Food purchasing is managed both centrally and locally: the Food Services Department central office manages large contracts that involve all locations (e.g., meat, fish, equipment, china, silverware), and a particular restaurant may buy its own supplies (e.g., fruit and vegetables) after consultation with the Food Services Department Chef.

27. Each facility within the Food Services Department has a separate budget, with revenues and expenditures established for each. However, the Food Services Director oversees the process and there is a form of centralized budgeting as well. For example, the Director decides when major renovation will occur at a particular facility. In the event of such capital expenditures, funding is also available from a central Commission fund in addition to a central Food Services Department budget. This form of capital redistribution is in keeping with the Commission's mandate to maintain certain services for the public, despite the fact that particular facilities consistently provide greater revenues than others. (For example, the Commission expects Table Rock restaurant to have greater revenues because of the "huge advantage" it enjoys in location.) Other aspects of management from central Commission offices include maintenance, security and accounting services.

28. Management of the restaurants - and, indeed, of all of the various other employees of the Food Services Department - is subject to the Commission's centralized Human Resources office. There is no Human Resources officer employed on location at any of the restaurants. Throughout the Commission's work-force, hiring is at least in part a centralized function. All job applicants must submit applications to the Commission's central Human Resources office. The Commission also uses a centralized payroll system. All servers record their hours on timecards (at the restaurant where each works) which are forwarded to the payroll office.

29. In the case of the restaurants, the hiring process is initiated at the local restaurant level. A restaurant manager advises the Director of any need for staff (and the current Director, Mr. Alois Poltl, could not offer any example of refusing a manager's request). The Director then obtains two or three names from the central Human Resources office, and passes the names to the restaurant manager. The manager then interviews the candidates and makes a hiring recommenda-

tion to the Director, and that recommendation is usually followed (Mr. Poltl could offer no example of refusing a recommendation). Employee performance appraisals are the responsibility of each restaurant's supervisors. Mr. Poltl reads the appraisals and, in his experience, has generally approved them as presented, except that he may investigate further in the unusual event of a particularly negative or positive appraisal. Discipline and dismissal are managed by the Director on the recommendation of the restaurant manager. A restaurant manager has authority up to and including suspension of an employee pending further investigation. Any further action requires the involvement of the Director.

30. Despite the seasonal nature of their employment, each server's employment is linked to the particular restaurant where she or he works. Servers are recalled annually to their usual restaurant. Queenston's Heights restaurant and Diner on the Green each have a "type of seniority list" governing recall. This is also the case at Victoria Park, but for the variation caused by the fact that some servers remain employed during the winter and simply "stay on" through to the next spring/summer season. As noted above, Table Rock is open year-round.

31. There is little evidence of interchange of employees between the four restaurants. Occasionally (once or twice per year), very large functions at Queenston Heights cannot be managed by the location staff alone. In those instances, there are "informal transfers" of servers from other restaurants, for whom "just a couple of hours or days of work" may be assigned to the Queenston Heights location. These assignments happen on a volunteer basis.

32. The Food Services Department Director acknowledged that there is generally no need for assignment of servers to locations other than their home' location. On the other hand, he noted that such assignments have occurred with management staff and cooks, in the case of regular staff vacations or sick leave. Although there are also regular formal transfers of managers and chefs and chef's apprentices between restaurants, the Director knew of no such transfers (or requests for transfers) involving servers. There was one case (ending some two or three years ago) of a server working at more than one restaurant; even then, the server was "more or less completely" at one location during the peak summer season, then at Table Rock for the winter "but sometimes at Victoria Park for functions".

33. Although the Director described a positive managerial approach to promotional opportunities and workplace mobility for servers, there is little (if any) such movement by servers. There was a single example of a server who was promoted but who eventually returned to the server position. Another server was employed as a secretary in the Director's office, gaining work experience related to concurrent college studies. Some servers have become hostesses. In the case of managerial staff and chefs, there is evidence of regular promotions and transfers, with resultant regular interchange between restaurants. Generally, there is no formal advertisement process for promotional opportunities in the Food Services Department; word of mouth' suffices. The only formal statements of transfer policy are in the "parks employees" collective agreement and in the "Seasonal Employees' Manual" (prepared annually by the Commission for distribution to both bargaining unit and non-bargaining unit seasonal employees). In both cases, the policy relates only to transfers between *departments* (e.g., Food Services to Horticultural); it apparently applies to transfers *within* departments, but no specific examples were described.

34. The Director indicated that transfer opportunities were available between the current bargaining unit and non-bargaining unit positions. He suggested no differing management requirements in respect of the two groupings, but admitted that the collective agreement probably caused some restrictions in the event of such transfers.

35. There was no evidence of any management difficulties at any of the restaurants arising from the mix of bargaining unit and non-bargaining unit staff in the same facility.

36. When asked to assess the impact the applicant's proposed bargaining unit would have on his department, the Director replied that "not knowing what the collective agreement would be, I couldn't really comment one way or the other. But it would be different for one location from the other three. It would change the operation of one location from the other three".

The Applicant's Organizing Efforts

37. The applicant's Business Manager, James Whyte, testified about the union's efforts in organizing the servers. A server first contacted the union about six years ago; but the union did not proceed then with an organizing campaign because OPSEU representatives indicated that OPSEU was "working on organizing them". There is no evidence of other organizing efforts in respect of the servers.

38. The applicant focused its efforts on employees at Table Rock and Victoria Park. Queenston Heights employees told a union representative that they had no problems at their workplace and that they did not need or want a union. The union did not approach any of the three or four servers at Diner on the Green.

39. The union called meetings at a hall in Niagara Falls about one or two weeks before filing its application. Servers from Table Rock, Victoria Park and Queenston Heights attended. Mr. Whyte remembers that about seven to nine Queenston Heights employees attended the first meeting and that one of them returned to the second meeting. Since he understood that there were twelve to fifteen servers at Queenston Heights, he believed that a majority of that restaurant's employees were present. Mr. Whyte explained the certification process, and advised the Queenston Heights servers that the employer would probably include them in its proposed bargaining unit. He told them that the union would respect their wishes and that it would apply only for certification in respect of the other three restaurants.

40. Under cross-examination, Mr. Whyte suggested no obstacle to organizing the Queenston Heights employees other than their lack of support for the union. He made efforts to convince them to join, but they wished to maintain their "seclusion". They were worried that joining with the others would mean that those others might be able to transfer into their restaurant and take their jobs. Mr. Whyte also asked employees about the degree of integration between the restaurants since he knew this would affect the union's application.

Decision

41. As the Board remarked in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, disputes over bargaining unit description require the Board to answer a "relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer."

42. Of course, the notions of "community of interest" and "serious labour relations" problems are elastic enough to complicate the answer to the simple question. Different communities of interest exist simultaneously among various groupings of employees (see the discussions of this point in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330; *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, and *Hospital for Sick Children*, *supra*, for example). And as the Board commented in *Royal Ottawa Health Care Group*, [1993] OLRB Rep. July 664 at para.

19, it “has not been easy for the Board, or for the parties in the community, to determine with any degree of certainty what might constitute a serious labour relations problem for a particular employer”. Each case turns on the particular facts before the Board, and there are no bright line tests to apply to the facts.

43. Despite the fact-specific approach in assessing a proposed bargaining unit for sufficient community of interest and for potential serious labour relations problems, the Board has been guided by a constant theme: an aversion to undue fragmentation. Even before recent amendments to the *Act*, the Board described the obvious labour relations advantages of the most comprehensive unit (see, for example, *National Trust*, [1986] OLRB Rep. Feb. 250, at para. 12; *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85, at para. 21; and *Royal Ottawa*, *supra*, at para. 19). Since the changes occasioned by Bill 40, the Board has indicated that the *Act* shows further support for broader-based units (see, for example, *Royal Ottawa*, *supra*, at para. 23, and the Board’s comment in *Salvation Army*, *supra*, that the statute “now tilts” in favour of broader units if other statutory goals can be met as well”). Indeed, counsel for the Commission argued that the amended *Act* compels the Board to prefer larger units.

44. Fragmentation is undoubtedly a critical factor in the generation of serious labour relations problems. It may trigger significant disruption of the employer’s management of the enterprise, and it may result in non-viable collective bargaining relationships. The Board has often reviewed the problems that may arise where there is a “proliferation of small units” or a “patch-work quilt” of bargaining units”. Fragmentation can limit employee mobility through development of seniority enclaves, and can precipitate unnecessary work stoppages or organizational problems when one fragment strikes, and can spawn jurisdictional disputes or inter-employee rivalries, and can discourage equitable treatment of employees doing similar jobs (see further review of potential problems in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 at para 28; and *Hospital for Sick Children*, *supra*, at paras. 18-20; and *Salvation Army*, *supra*, at para. 21). Facing concerns of that sort, it is not surprising that the Board admits to the “instinctive attractiveness of broader-based units” (as described at paras. 12-13 of *National Trust*, *supra*).

45. The concern for fragmentation, however, does not lead automatically to the selection of the largest viable unit. The Board has regularly commented that the *Act* compels applicants for certification to seek an appropriate unit, not the *most* appropriate unit. Other factors compete with the concern for fragmentation - most obviously, the concern for employee access to collective bargaining. Although a particular unit might appear *more* or *most* appropriate, the Board will prefer another appropriate unit where it finds its concern for employee access to collective bargaining outweighs the potential for serious labour relations problems (including fragmentation).

46. This balancing exercise is necessitated by the competing objectives of the *Act*. The Board can neither simply give the union what it wants, nor simply seek to minimize administrative problems for the employer. The Board considered the statute’s goals in *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7:

10. . . . The preamble to the Act makes it clear that it is the intention of the Legislature to encourage collective bargaining . . . More specifically, section 6(1) of the Act expressly provides that the wishes of the employees as to the appropriateness of the unit are to be considered by the Board. In other words, the Act recognized that it is desirable that employees be able to organize in a form that corresponds with their own wishes . . .

11. The right of self-organization, however, must at times compete with the need for viable and harmonious collective bargaining . . . [The] Board has a responsibility under the Act to create a rational and viable collective bargaining structure, even though the exercise of this responsibility may sometimes conflict with the right of self-organization.

In *K Mart, supra*, the Board again considered the statutory themes that govern determination of the appropriate bargaining unit:

8. . . . The objectives of the statute relate not only to the promotion of collective bargaining as a means of determining the terms and conditions of employment, but also to a recognition of the principle of individual freedom of choice, and to the creation and maintenance of sound and viable bargaining structures. In determining the appropriate bargaining unit the Board does not give effect to one of these aims to the exclusion of the others. Rather, the task which falls to the Board in the exercise of its discretion under section 6(1) of the Act requires a balancing of these statutory objectives in the circumstances of each case. The Board practice of circumscribing bargaining rights by reference to the municipal boundary, segregating plant and office employees and requiring the inclusion of all office or production employees within a single bargaining unit reflects this balancing.

47. The Board more recently summarized the variety of considerations that govern appropriate bargaining unit determination in *Salvation Army, supra*:

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) "serious labour relations problems". A trade union need not seek to represent the *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. **As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.**

[emphasis added]

* * *

48. Having considered the evidence and thorough submissions of counsel, I have concluded that the applicant's proposed unit will not generate serious labour relations difficulties for the employer. The unit is viable. Further, the unique circumstances of the Commission and its restaurant servers cause concern for employee access to collective bargaining. Although a unit encompassing all of the four restaurants might be a *more* appropriate unit, I find that the proposed three-restaurant unit is *an* appropriate unit.

49. It was the submission of the Commission that a bargaining unit of servers must include all four restaurants in order to ensure viable collective bargaining and to avoid undue fragmentation. In its view, the critical factor governing the Board's determination should be the degree of integration between the four restaurant locations. It described the four restaurants as one unified endeavour in which all servers share a community of interest. The Commission also urged that its special statutory nature underlines the necessary integration of Commission worksites.

50. In the Commission's further submission, the OPSEU units established by Regulation indicate a legislative preference for "park-wide" units. However, I am not convinced that Regulation 258 supports that argument. A review of the various bargaining units established by that Regulation (as amended from time to time) suggests that the Lieutenant-Governor-in-Council simply avoided dealing with the issue of geographic scope when prescribing bargaining units. Of the vari-

ous units set out in the Regulation, only one contains any reference to geographic scope (c.f. the unit in respect of the Ontario Housing Corporation); and that appears only to carve-out a particular geographic region because of a pre-existing bargaining unit that was certified for the region.

51. The applicant suggested that the Board ought to follow its practice of finding that a single-municipality unit is appropriate (making reference to cases including *Bruce Peninsula & District Memorial Hospital*, [1982] OLRB Rep. May 656 and *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637). But the Board has not adopted that approach as an inflexible rule. As counsel for the Commission observed, the Board has been prepared to depart from that practice where there are exceptional circumstances, such as functional integration of worksites in several municipalities. In any event, the single-municipality practice is simply a short-hand solution to the necessary balancing exercise that the Board must always undertake in determining an appropriate bargaining unit. As the Board observed in *K Mart, supra* (see the quotation in paragraph 46 above), the practice is just one method of balancing the competing objectives of the *Act*.

52. The unique circumstances of this case require something more than reliance on the single-municipality unit practice. The statutory and regulatory framework that governs the Commission creates a multi-municipal enterprise. Pre-existing bargaining units are park-wide and, therefore, multi-municipal. Moreover, this case is exceptional because the pre-existing bargaining structures at the workplace were determined under the extraordinary method for establishing bargaining rights under old *CECBA* (i.e., by Lieutenant-Governor-in-Council fiat). The case is also exceptional because of the recent change in governing labour law; the old Regulatory method of bargaining unit determination and assignment of bargaining rights is now defunct. Further, the Commission's "Crown employees" might now be organized by any sort of trade union rather than only by those that met old *CECBA*'s definition of "employee organization".

53. Accordingly, the determination in this case ought not to be governed either by the applicant's suggestion of reliance on the single-municipality practice, nor by the Commission's suggestion of a natural community of interest among restaurants operating as a single unified endeavour.

54. Despite the Commission's view, the evidence indicates unity of endeavour at other levels. Instead of a restaurant enterprise, the Commission more truly operates as a single park-wide enterprise. For instance, all seasonal employees (whether bargaining unit or not), including the servers, are governed by a standard Manual of terms and conditions of employment. Where there is relevant sub-division of the park-wide enterprise, it is at the Department level. The restaurants are merely part of the integrated operation of the larger Food Services Department.

55. The balance of the evidence suggests that servers find community of interest with fellow employees at their home restaurant. (The parties' positions make it unnecessary for the Board to determine whether each restaurant would constitute an appropriate bargaining unit.) That evidence includes the fair degree of local facility management, the powers of effective recommendation that managers exert in conference with the Department Director, and the local restaurant versions of seniority systems in annual recall of servers. The servers have single-site oriented employment homes. They rarely, if ever, work at other restaurants. They return to their home restaurant season after season. They do not generally (if ever) look to other sites for promotional opportunities. From a practical perspective, it is hard to imagine that a three-restaurant unit will cause significant constraints on employee mobility or promotional opportunities.

56. I also find that the rarity of employee interchange detracts from community of interest among servers of all four restaurants. As noted in the *K-Mart, supra*, decision, at para. 13, interchange of employees is a factor of major significance in determining if a community of interest

exists between employees at separate locations. Since the Board views restriction of employee interchange as a potential cause of serious labour relations problems, the absence of regular interchange in the instant case supports my finding that the three-restaurant unit will not cause serious labour relations problems.

57. The pre-existing bargaining structure also contradicts the Commission's suggestion of a four-restaurant enterprise that would suffer serious labour relations problems in the event of a three-restaurant unit. That bargaining structure has created rather odd rifts between employees. For no apparent reason, servers are the only seasonal employees at the Commission that are excluded from the OPSEU "parks employees" collective agreement. Although the regulatory bargaining unit description excludes all seasonal employees, the parties later agreed to sweep in all seasonal employees - except for the servers. For some years, therefore, non-bargaining unit servers have worked alongside bargaining unit employees in other restaurant classifications. As the Commission admits, this situation has not caused serious labour relations problems; indeed, there was no suggestion of any resulting labour relations problems. The Commission's ability to manage this form of fragmentation in its Food Services Department counters its largely speculative argument that a three-restaurant unit of servers would generate serious labour relations problems.

58. Although a three-restaurant unit may result in terms and conditions of employment that differ from those of employees in the fourth restaurant, I cannot conclude that this will cause serious labour relations problems. Collective bargaining will likely focus on that issue and the parties may be able to reduce the issue to something short of a problem. As noted, the Commission already experiences a version of overlap of bargaining unit and non-bargaining unit employees within the restaurants with no evidence of resulting problems.

59. A different concern that arises from the three-restaurant unit is the isolation of the servers at the fourth restaurant. As the Board observed in *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371 (at para. 14), fragmentation is problematic where it isolates a group of employees so small that it has no real chance of entering the world of collective bargaining. In the instant case, neither the Commission nor the affected employees suggested that the employees at Queenston Heights restaurant would be unable "to enter the world of collective bargaining" on their own. Among the four restaurants, Queenston Heights appears to have a relatively large staff. And the evidence suggests that a majority of employees considered and rejected the option to organize at this point. Even if future bargaining is affected, the Board is not unaccustomed to the possibility of compromising collective bargaining to the extent necessary to foster self-determination. (See *Ryerson, supra*, para. 19, where the Board commented on the *K Mart, supra*, decision that had resulted in certification of a one-store unit as opposed to the four-store, single-municipality unit sought by the employer.)

60. In further arguing the potential for serious labour relations problems that would arise from a three-restaurant unit, the Commission pointed to pay equity plan disruption. Although that may be a problem, it does not amount, in isolation, to a serious labour relations problem. Even the Commission's proposed four-restaurant unit would cause disruption of existing pay equity plans. The Commission did not describe its proposal as problematic for pay equity purposes, and I do not find that the potential problems of the three-restaurant unit are serious enough to outweigh the other considerations in this particular case (in particular, employee access to collective bargaining).

61. With the two pre-existing OPSEU units, and with the potential for a further unit at the fourth restaurant (and possible combination with the three-restaurant unit), the Commission is not faced with the "excessive subdivision" or "proliferation of small units" and the attendant serious labour relations problems described in *Salvation Army, supra*, or *Bestview Holdings, supra*. Simi-

larly, the instant circumstances differ significantly from those in either *MDS Health Group Limited*, [1993] OLRB Rep. Sept. 849, or *Cybermedix Limited*, [1979] OLRB Rep. Aug. 743, where there were large numbers of locations (e.g., twenty-six) in a relatively small geographic area.

62. As the Commission noted, the Board nonetheless recognizes the possibility of undue fragmentation even where the facts do not suggest “excessive subdivision”. In *Hornco Plastics Inc.*, [1993] OLRB Rep. May 411, as in the instant case, the employer operated integrated operations (two manufacturing plants) on either side of a municipal boundary. The Board in that case noted that the exception was as important as the rule in respect of the Board’s practice in respect of municipal units. It determined that the larger Regional Municipality unit (like that sought in the instant case by the Commission) that would include both plants was appropriate. Counsel for the Commission suggested that the case of *Royal Ottawa, supra*, was an even more persuasive precedent. In that case, the employer operated two main integrated hospital sites and a number of satellite locations; the applicant sought a unit that excluded one of the main sites. The Board concluded that serious labour relations problems would arise if the smaller unit was declared appropriate (e.g., the costs of collective bargaining, the need for a new pay equity plan).

63. In both of those cases, the Board carefully considered the degree of integration between the employers’ various worksites. In the case of *Hornco Plastics, supra*, the two integrated plants were among four under a single general manager. The two sites shared a single payroll, a single seniority list, identical terms and conditions of employment. The two sites shared central departments for sales, purchasing, customer service, accounting and record-keeping, all of which were located at one of the two sites. A single customer order for product would be met by the two sites working in tandem. There were fifty examples of transfers of employees between sites. In the case of *Royal Ottawa, supra*, there were similar instances of close integration between the two main hospital sites (centralized payroll, human resources management, corporate planning). But, as in the case of the restaurants of the Commission, there was a significant degree of local management autonomy at each site, and an insignificant degree of employee interchange between sites.

64. The Commission’s unique circumstances separate it from these precedents of enterprises with bargaining histories developed under the *Labour Relations Act*. The fragmentation that results from the applicant’s proposed unit is of a different sort, and it occurs in a very different enterprise. In both *Royal Ottawa, supra* and *Hornco Plastics, supra*, the applicants sought to carve out large portions of clearly integrated work-forces. In the instant case, the boundaries of an integrated work-force are more difficult to find. (The Commission itself referred at times to a four-restaurant endeavour and at other times to its general park-wide enterprise.) And the services are an unusual fragment of unorganized employees in a highly organized workforce. More significantly, there are different facts and different collective bargaining rules at play in assessing the competing factor of employee access to collective bargaining.

65. It is in the context of the Commission’s unique statutory status and the recent shift in labour relations regime that the Board must consider the possibility of obstacles to self-organization for the servers. These servers are not simply comparable to employees in the service industry such as those who have appeared in previous proceedings before the Board involving the service industry. To that extent, argument of historical sectoral organizational obstacles for service industry employees would not be conclusive. These servers are “Crown employees” (or, at least, were “Crown employees” until the recent *Public Service Act* amendments) whose labour relations world is framed by *CECBA*.

66. Although the pre-existing bargaining structure may suggest that a park-wide unit of ser-

vers is appropriate, that same structure has resulted in obstacles to organizing. The old *CECBA* usurped the right of self-determination in some instances (as evident in the grant of OPSEU units at the Commission) such that the labour relations regime itself contained inherent obstacles to organizing. Representation rights developed in a different, more limited labour relations world; it is not clear that employee self-organization under the *Labour Relations Act* would have followed the same course. The principal parties in a large, highly organized workplace under the old *CECBA* excluded a small group of employees from collective bargaining. It is that small isolated group that is the only unorganized group of employees (leaving aside part-time employees) under the new, broader rules of the *Labour Relations Act*.

67. The bargaining structure that developed at the Commission under *CECBA* has constrained organizing under the new regime based upon the *Labour Relations Act*. The servers are left boxed together, with their shared isolation suggesting a community of interest. This sort of arbitrary pre-determination of an appropriate structure for organizing presents an obstacle to self-determination. If there is a sectoral obstacle to organizing in this case, it is created by the transitional stage of labour relations for public sector workers like the servers.

68. In conclusion, I am not persuaded that serious labour relations problems will arise from the three-restaurant unit. Further, I find that the unusual circumstances of these public sector employees give rise to concern for employee access to collective bargaining.

69. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

70. The applicant applied to represent employees in the following unit:

all employees of the respondent employed as servers in the City of Niagara Falls save and except supervisors, persons above the rank of supervisor, students and employees in units for which any trade union held bargaining rights as of July 5, 1994.

71. Apart from the issue of geographic scope, the Commission also took issue with the wording of the underlined portion of the applicant's proposed unit. The Board has determined, however, that the applicant's right to certification cannot be affected by the resolution of the wording of that phrase. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the responding party in the bargaining unit on July 5, 1994, the certification application date, had applied to become members of the applicant on or before that date.

72. Accordingly, issuance of a certificate to the applicant is subject only to resolution of the wording of the phrase underlined in paragraph 70. The parties have indicated that they should be able to resolve this issue on their own. A certificate will issue when the parties advise of that resolution, or, in the alternative, when the Board resolves that issue at the request of either party.

0084-94-U The Ottawa-Carleton Public Employees Union Local 503, Applicant v. The Ottawa Public Library Board, Responding Party

Change in Working Conditions - Unfair Labour Practice - Board rejecting union's claim that "freeze" obliging employer to give certain bargaining unit members 3 per cent wage increase, as result of "promise" allegedly in place when union applied for certification - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *S. C. Laing* and *H. Peacock*.

APPEARANCES: *Susan Ballantyne*, *Lesley Hoermann* and *Joan Keith* for the applicant; *Andrew Tremayne* and *André Champagne* for the responding party.

DECISION OF THE BOARD; March 6, 1995

I

1. This is an application under section 91 of the *Labour Relations Act*. The union alleges that the responding employer (sometimes referred to herein as "the Library") has contravened section 81 of the Act.

2. Section 81 is commonly referred to as the "statutory freeze", and is triggered by an application for certification, or a notice to bargain for a new collective agreement. It reads as follows:

["FREEZE" ON AN APPLICATION FOR CERTIFICATION]

81.-(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

["FREEZE" ON GIVING NOTICE TO BARGAIN]

(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

(3) Where notice has been given under section 54 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 45 applies with necessary modifications thereto.

Both parts of section 81 may be relevant to the disposition of this case, because the “freeze on applications for certification” [81(2)] feeds into the “freeze triggered by notice to bargain” [81(1)].

3. The union applied for certification on November 24, 1993. It was subsequently certified on an *interim basis*. On December 16, 1993 the union gave a “section 14” notice of its desire to bargain a first collective agreement. On January 21, 1994 the Board issued a *final* certificate formalizing the union’s right to represent the employees in the bargaining unit.

4. The union contends that its application for certification on November 24, 1993, triggered the “statutory freeze” under section 81(2). The union claims that as a result of that “freeze”, the Library was obliged to give bargaining unit employees making less than \$30,000 a year, a general wage increase of 3 per cent, effective January 1, 1994. About half of the employees in the bargaining unit fall into this category.

5. The union asserts that the 3 per cent 1994 salary increase for these lower paid workers was a “promise”, firmly in place when the union applied for certification in 1993. The union argues that the proposed salary increase for the following year was a “*term or condition of employment*”, an employee “*right*”, or an employee “*privilege*” which was “frozen” as at November 24, 1993, and could not be changed thereafter without the union’s consent. The union asserts that the “under 30’s” reasonably expected to receive this 3 per cent wage increase for 1994, and when the employer decided not to pay it, there was a breach of section 81 of the Act.

6. The Library replies that there was never an unconditional undertaking to raise the wages of half the bargaining unit by 3 per cent in 1994. Nor could there have been; because the Library’s ability to pay its employees, depends entirely upon funds made available for that purpose by the City of Ottawa (“the City”). The Library is the nominal employer, but the City is the effective paymaster. If salary dollars are not forthcoming from the City, because of the City’s shifting budget priorities, those monies cannot be passed along to Library employees.

7. In the Library’s submission, the amount that Library employees can reasonably expect to receive depends entirely upon what the City - not the Library - determines is appropriate, having regard to City revenues (from taxation primarily) and City expenditures. The Library maintains that employees should be well aware of that linkage, because the situation complained about here has happened before - proposed and anticipated salary increases for 1993 (i.e. to begin in January 1993) were rescinded when the City instituted budget cuts, then passed along a share of that burden to the Library and its employees.

8. The Library acknowledges that until the summer of 1993, its employees may have anticipated, a 3 per cent across the board increase in calendar 1994. Even after August 1993, the “under 30’s” may still have hoped for such increase - although, by then, salaries had been frozen for all bargaining unit employees earning more than \$30,000. (These dates and details will be explored

below). Indeed, the Library itself had not foreclosed the *possibility* of a salary increase for the under 30's until late fall 1993.

9. However, in the Library's submission, both the likelihood of there being a salary increase, and the Library's ability to pay it, depended, as it had in the past, upon the City's budgetary prescriptions. A 1994 salary increase was never an established "term or condition of employment", "right", or "privilege" for the "under 30's" or anyone else. Thus, when the union applied for certification in November 1993, a future salary adjustment for the under 30's in 1994 was, at best, a *contingency* that depended upon the City's budgetary considerations. When those budgetary considerations intruded on the Library's own budget, as it had in the previous year, a salary increase for bargaining unit members became impossible.

10. Much of the background to this case is not substantially in dispute. However, before reviewing the facts, it may be useful to briefly comment on the statutory framework within which the parties' rights must be determined.

II

11. The purpose of the statutory "freeze" is to maintain the pattern of the existing employment relationship, in its entirety, while the parties are bargaining for a new collective agreement. In the case of a first collective agreement, the negotiated arrangement will replace the common law relationships that went before.

12. Section 81 is a bridge between the old regime of employment at will on terms prescribed unilaterally by the employer, and the new regime of collective bargaining, where the terms of employment are set through negotiations with a trade union. The freeze ensures that there will be a fixed basis from which to begin those negotiations, and prevents any unilateral alteration of the status quo which might give one party or the other an unfair advantage, either from the point of view of bargaining or propaganda (*AES Data Limited*, [1979] OLRB Rep. May 368 at para. 10).

13. The freeze is designed to facilitate *bargaining*. It preserves the elements of the employment relationship that are usually the subject of bargaining, until the parties have had an opportunity to address them through a process of bilateral discussion. The freeze terminates either with the conclusion of a new collective agreement, or with the completion of the conciliation process. In the former situation, the collective agreement establishes the new "status quo". In the latter situation, the parties are free to make changes, to bargain for changes, or to oppose changes, using the full arsenal of collective bargaining weapons.

14. We have used the term "freeze" in the preceding paragraphs because that is the way that section 81 is customarily described. However, the freeze metaphor is something of a misnomer. It suggests a much more static result than the Board has usually found to be permissible. As currently interpreted, the so-called "freeze" is neither totally static, nor does it totally prevent changes to the employees' position on the job. What is "frozen", the Board has said, is "business as usual".

15. Section 81 is reproduced above. However, its terms present interpretive difficulties. If read too literally, they could either cancel each other out or, have a profound and paralyzing impact on the operation of the business, before the right to engage in collective bargaining is even finalized. In *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261 the Board observed:

The freeze provisions give rise to difficult problems of interpretation, for if treated as a total prohibition on any employer actions taken in the ordinary course of business which impinged upon the employment relationship, the freeze would effectively paralyse the employer's opera-

tions during the bargaining process; while, if the pre-existing but now frozen entrepreneurial rights are given too broad an interpretation, they would render the section meaningless.

Accordingly, in *Oakville Lifecare Centre*, [1993] OLRB Rep. Oct. 980, the Board suggested a more flexible and purposive approach:

. . . the Board has consistently interpreted the freeze provisions in a . . . purposive manner and has rejected any strict, literal interpretation of the provisions which would result in a static, unchanging employment and business environment. A flexible, more purposive labour relations approach permits the Board to be more responsive to the circumstances, concerns and interests of the litigants appearing before it. For that reason, the Board has developed tests such as “business as usual” and the “reasonable expectations of the employees”.

16. The fact is the “business as usual test” enunciated in cases such as *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859 is sometimes quite difficult to apply - particularly in the contemporary business environment where volatility, changeability or “restructuring” have become the norm. Nor does a “business as usual test” capture the fundamental change occasioned by the application for certification itself - the advent of *collective* methods of decision-making, instead of dealing with employees on an individual basis. Thus, as the Board observed in *Simpsons Limited*, [1985] OLRB Rep. April 594, “business as before is a slippery concept to apply to specific fact situations”, unless the employer’s employment practices are embodied in a written policy manual (as in *J.M. Schinder Inc.*, [1984] OLRB Rep. April 609).

17. In *Simpsons* the Board noted that “business as usual” is simply not a very good guideline for analyzing “first time events”, that arise as the employer tries to adapt to a changing market place. In those circumstances, the Board suggested that it might also be useful to consider whether an employee would “reasonably expect” that particular kind of business response during the freeze (see *Simpsons*, *supra* at paragraph 33). The Board then explored how contracting out, lay-offs, or other labour adjustments made by the employer during the “freeze” might (or might not) be within the “reasonable contemplation” of an informed employee and thus permitted despite section 81.

18. But once again (and apart altogether from the problem of making employer-employee rights dependent upon what employees *think* they are) the “reasonable expectations test” is quite malleable, and cannot be linked back to the broader statutory purpose without also giving consideration to its converse: is the proposed “change” the kind of employer response that employees might reasonably expect to occur in the circumstances, and/or is it the kind of thing that *the parties* would expect to be - and should be - subject to bargaining prior to implementation. The reasonable expectations of employees are shaped by a variety of things, including: the past, contemporary business realities, and the promise of collective bargaining which the “freeze” is designed to foster.

19. We do not think that it would serve much purpose to explore the Board’s many cases in this area. It is difficult to distil a set of unifying principles that support an unequivocal result in each new fact situation - a dilemma that is underlined in this particular case by the fact that *both parties* rely upon the same cases, and each party asserts that *its* preferred result reflects the correct application of the “tests” emerging from those cases: “business as usual”, or what an informed employee would “reasonably expect” in the circumstances.

20. It suffices to say that we prefer the flexible approach to section 81 enunciated by the panel in *Ottawa Life Care*, *supra*. We think we are obliged to give content to the words “rates of wages or any other term or condition of employment”, “any right”, and “privilege”, in a way that is faithful to both the statutory purpose, and the collective bargaining context under review. That context includes: the existing pattern or the employment relationship; whether proposed changes

are reasonably foreseeable; whether such change if implemented would unduly disrupt, vitiate or distort the bargaining process; whether (having regard to the scheme of the Act) changes of this kind "ought" to be subject to collective determination rather than unilateral action; and so on. Considerations such as these help the Board decide how "deep" the freeze actually is in a particular case, and whether the proposed change is consistent with the regime of reciprocal collective bargaining rights that the statute regulates and that the freeze is designed to facilitate.

21. With these observations, then, we return to the facts of this particular case.

III

22. The Library is a public agency controlled by the City of Ottawa. The City appoints the 11 Trustees that make up the Library's Board of Trustees. One of those trustees is a city counselor.

23. The City provides 87 per cent of the Library's funding, and, for budgetary purposes, treats the Library as a City "department". The Library has no taxing powers and few independent sources of revenue. For practical purposes, the Library's spending is dictated by what the City will provide for or approve. Despite an "independent" Board of Trustees, the Library is a creature of the City.

24. The Library employs approximately 200 full-time and part-time workers, and a further 200 or so "casuals". The utilization of casual employees varies from month to month. Employee salaries make up about 65 per cent of the Library's operating budget, which, as noted, is approved and funded by the City.

25. The employees' terms and conditions of employment are prescribed in an "Employee Handbook". That handbook sets out their salaries, employment benefits, vacation entitlement and so on. It includes job classifications with associated salary levels, together with a wage progression through which employees move, over time, as they get more experienced in a particular job. An employee advancing through the salary grid can anticipate a salary increase of about 5 per cent per year of experience.

26. The Employee Handbook is the only *document* specifying the employees' terms and conditions of employment. It makes no provision for "across the board" salary increases on an annual basis or otherwise - although such increases have been granted by the Library from time to time. The parties describe such across the board increases as "COLA" adjustments, and for ease of reference we will adopt that label here.

27. At the time of this complaint, about one-half of the bargaining unit employees earned less than \$30,000 per year. By contrast, we were told that *none* of the City's permanent employees earned less than \$30,000. We were told that the only group of *City* employees who *might* be in this low income category, are "casuals", whose annual earnings fluctuate, and cannot be reliably predicted or determined by the City until the end of the calendar year.

28. The salaries of Library employees are not the *same* as those of City workers (i.e. a Library clerk may not be paid the same amount as a City clerk doing the same kind of job), but salary *increases* or benefit *changes* for Library employees are influenced by what the City is doing for its own work force. Library employees expect that improvements for City workers will ultimately be passed along to them too. And, of course, that is hardly surprising when the City controls the Library Board, provides the lion's share of its funds, and treats the Library as City "department".

29. Salary movements for Library workers tend to follow the precedent set by the City for its own employees. However, City employees are represented by Local 503 of the Canadian Union of Public Employees ("CUPE"). Any changes in the terms and conditions of employment for City workers follow a collective bargaining timetable, determined by the length of the prevailing CUPE collective agreement (i.e. 1 - perhaps 3 years depending upon what the parties negotiated in the last round of bargaining). Accordingly, the situation of Library employees is assessed by the Library in light of both the cycle and outcome of the collective bargaining in which City employees are engaged from time to time.

30. It is important to appreciate, however, that the position of Library workers neither perfectly matches nor perfectly "tracks" that of comparable City employees. There is a difference in overall salary scales to which we have already referred, and across the board salary increases (COLA) do not necessarily move in tandem or by the same amount - even though the City and the Library both try to maintain comparability and similar treatment.

31. Any COLA granted to Library employees in a given year is determined by the Library towards the end of the previous year, when the Library is constructing its next year's budget. However, the annual budget exercise undertaken by the Library (in conjunction with the City) does not necessarily correspond to the City/CUPE collective bargaining cycle, and because of that there have been years when the Library has had to establish its budget and decide what to pay its employees in the coming year, *before* the City employees have settled their collective agreement for that year. In those situations, the Library Board has made its own judgement of where the settlement point was likely to be, and drafted its budget accordingly. The result, though, is that in some years the Library employees got an across the board salary increase ("COLA") that was *different* from that received by City workers. However, where that happened, the Library employees would typically receive additional consideration, or "catch-up", in the following year.

32. According to Gilles Frappier, the chief librarian, the operative principle was parity, even though the Library was not always able to achieve it. The Library salaries did not necessarily move in "lock step" with the settlements negotiated by CUPE for City employees, but the Library did try to mimic these movements. As he put it "we try to achieve parity of percentages through the guidelines that we obtain from the City . . . the direction is from the City down, not from us up . . .". It is the City that sets the agenda for both salaries and other items of operating expenditure; and it is the City that provides the funds to meet the Library's various expenditures.

33. This linkage to City benchmarks, and City budget considerations, can be illustrated by what happened in November 1992 - the year preceding the union's application for certification.

34. In November 1992, the Library was engaged in a budget making exercise much like that undertaken the following year, (when the union applied for certification). The 1992 budget making process involved a projection of the Library's 1993 operating expenditures, which were then forwarded to the City for review and approval. The City's review was undertaken in conjunction with the City's assessment of its own anticipated tax revenues and expenditure priorities.

35. Mr. Frappier recalls that *in 1992*, the Library's *proposed* budget *for 1993* included a 3 per cent across the board increase for its employees. Those employees could therefore expect to begin receiving that increase in January 1993. This 3 per cent COLA for 1993 was built into the salary portion of the Library budget that was forwarded to the City for consideration in the fall of 1992.

36. Mr. Frappier's evidence on the events of 1992 is confirmed by that of Lesley Hoermann, who was then an executive member of the Ottawa Public Library Employees' Association

("OPLEA"). OPLEA was an organization of Library employees that engaged in informal consultation with the Library on matters of interest to employees - including wages and working conditions. However, there was no formal "collective bargaining". It was not until late 1993 that OPLEA changed its name, affiliated with CUPE, applied for certification, and formalized the collective bargaining relationship.

37. The salary increases proposed in the 1992 budget submission and planned for 1993, did not materialize, because of the financial difficulties that the City was then experiencing. Those problems prompted the City to review its own financial commitments, to revise its own budget, and to impose reductions on "departments" like the Library. In the result, the Library rescinded the planned salary increase for its own employees.

38. On November 19, 1992, Mr. Frappier issued a memo to Library employees informing them of the impact of the City's financial constraints on the Library's own budget. It reads as follows:

I would like to bring you up-to-date on recent Board decisions relating to our operating estimates. For the year 1993, the Library faces a 4% reduction and after several hours of discussions, we are now in a position to present estimates that will not require closing branches or services. The Board has made a commitment to guarantee job security. Therefore, no permanent employee will be laid off. Also, salary increments will be awarded in 1993 as usual. *However, in order to have job security, it was necessary to give up cost of living increases in 1993.* For fiscal year 1994, the City has promised a 3% increase if the cost of living remains below 4%. If higher than 4%, this offer will be renegotiated.

The Board has also requested management to complete our market survey in order to determine the relativity of our salaries with outside organizations. It is hoped that this study will be completed early in 1993. We will share this information with you when available. If appropriate, the Board will seek funds from the City to make necessary adjustments.

The Board has also approved three days of paid leave at Christmas 1992 and 1993. All non-public service employees will take this leave on December 29, 30 and 31. Although in some areas, skeleton staff may have to keep the service open. As the Library will be open to the public on December 29, 30 and 31, public service employees will have up to March 1993 to take this paid leave. This should be negotiated with your respective staff head. The paid leave for Christmas 1993 will be dealt with next year.

You will also be happy to learn that the Board has agreed to the topping up of maternity leave benefits as per OPLEA's request. The Board has also approved the implementation of an Employee Assistance Program for staff and families. More details to follow shortly.

Finally, starting with fiscal year 1993, the Board will no longer pay an allowance in lieu of OHIP. The Board feels that since the provinces of Quebec and Ontario now have a health tax on payroll, it is unfair to continue to pay Quebec residents this allowance. This should not be seen as withdrawal [sic] of a benefit but rather as an adjustment since the rationale for this payment no longer exists.

I hope the above will clarify the situation and will contribute to create a better work environment for all of us. Thank you for your patience, support and understanding during this most difficult time.

39. As will be seen, the City's fiscal difficulties in 1992 prompted budget cuts, which, in turn, had an impact in 1993 on both City employees, and on employees in the Library "department". Employees would continue to move through the existing wage progression and would not face lay-offs; there were minor improvements to their position, and an indication that the situation might be favourably reconsidered in 1994. There was also some prospect of a general salary revision, if the proposed market survey determined that Library salaries were "out-of-line" with com-

parable outside organizations. But the memo makes it perfectly plain that salary adjustments for Library employees are dependent upon the City providing the necessary money. Likewise, the memo makes it clear that the employees would not be getting the anticipated 3 per cent increase in 1993 because the City has not made the funds available. And there were other revisions to employee benefits which the Library decided to impose unilaterally.

40. We might observe, at this point, that the situation in November 1992 - one year prior to the certification application - illustrates both the dilemma discussed in *Sunnycrest*, and the difficulty of constructing a "business as usual" test that is consistent with the "freeze" metaphor.

41. The events of November 1992 would suggest that, for this particular group of Library employees, "business as usual" includes adaptation to changes in the broader City organization of which they are a part by means of wage cuts, lay-offs or the revision of benefits. The pattern of *their* employment relationship *could be and was unilaterally* altered by the Library, without prior notice, in response to externally imposed fiscal signals. And whatever the employees' hopes or expectations might have been prior to 1992, it must have been evident thereafter that the Library would respond as necessary to the fiscal constraints imposed upon it, and that any economic improvement for Library workers was ultimately dependent upon the Library receiving the necessary monies from the City. Library workers could hope and reasonably expect to follow the pattern established for City employees - but only so long as *the City* provided the necessary funds to do so.

42. The 1992 budget crunch was not the only event restricting the Library employees' economic prospects. In the summer of 1993, the Province of Ontario imposed its own program of financial restraint, in the form of the so-called Social Contract.

43. The Social Contract required public sector institutions to achieve wage savings in a variety of ways, including wage freezes, time off without pay, etc. The burden of the Social Contract cut-backs was supposed to fall upon employees making more than \$30,000 per year. However, the "Municipal Framework Agreement" negotiated under the Social Contract legislation contemplates that groups of municipal employees may be treated in the same way regardless of their income. Special treatment for "under 30's" could be balanced with "equal treatment" for everyone.

44. In the summer of 1993, the Library began revising its expenditures to meet the requirements of the Social Contract. At first, OPLEA was not directly involved, since it had never established its status as a trade union, nor engaged in formal collective bargaining. For that reason, OPLEA members were initially included in a "non-bargaining unit plan" proposed unilaterally by their employer. Later on, though, OPLEA was drawn into discussions with Library officials, and later still, OPLEA was granted status as an employee bargaining agent by the officials administering the Social Contract scheme (although, at that point, it had not sought or been granted certification as employee collective bargaining agent under the *Labour Relations Act*).

45. The Board heard quite a bit of evidence about the Social Contract discussions, which, by all accounts, were undertaken in haste, and marked by considerable confusion about what the provincial guidelines required, and how they could be met. And (perhaps not surprisingly given that confusion) the Library and OPLEA later differed about what had actually been agreed upon. In particular, there was a dispute about whether "excluding" the "under 30's" from the impact of the local social contract agreement was *total* - meaning that unlike municipal workers or other Library employees, the under 30's would have no days off, would continue to receive experience increases, *and could still receive an annual COLA increase of 3 per cent* (OPLEA's interpretation); or whether the "exclusion" for "under 30's" was "*partial*" - meaning that the under 30's would continue to receive any experience (progression) increments and would not have to take unpaid

leave, but would not automatically receive the 3 per cent across the board increase that the Library had previously hoped to provide in 1994 for all of its workers (the Library's interpretation).

46. For present purposes, we do not have to canvass the details of these discussions, nor resolve what in our view is an honest difference of opinion between parties negotiating under considerable pressure. But, it is useful to review certain aspects of these discussions, because they illustrate the relationship between the employees' expectations, and the ability of the Library to meet them without the necessary salary appropriations from the City.

47. The Social Contract formula allows wage increases foregone to "count" towards savings target. One can count as "savings" money one *planned* to spend in the future, but decided not to spend. The City and the Library both hoped to use the 1994 wage increase in this way. Thus, by early July 1993 OPLEA was or should have been aware that the 3 per cent across the Board increase might no longer be "in the cards" because it would be "used" to make up the savings targets composed by the Social Contract.

48. As a result of the Social Contract, and despite previous understandings, by July 1993 the COLA adjustment had been reduced to a "possibility". The City and the Library still hoped to provide it, but that was no longer certain. This is how the situation was described in an OPLEA memo to its members dated July 8, 1993:

Dave O'Brien, Chief Administrative Officer for the City of Ottawa, informed Mr. Frappier that the City believes it has an obligation to its employees regarding the 3 per cent pay increase negotiated for 1994, and it is currently investigating the *possibility* of granting this increase to staff. Mr. Frappier has been assured that any increase received by City of Ottawa employees will also be received by OPL staff.

As of July 8, 1993 the 3 per cent 1994 salary increase had become a "possibility", and OPLEA recognized that.

49. On July 26, 1993 the Library Board discussed possibility of imposing compulsory unpaid leave and *an across the Board salary reduction*, noting that "for the years 1994, 1995 and 1996, the City intended to use the 3 per cent COLA, which had been promised to staff in 1994, together with salary increments to make up the required amount for the Social Contract". The meeting minutes indicate that the Trustees were also of the opinion that "staff members earning less than \$30,000 would be excluded from the Social Contract". Mr. Frappier, who was there, testified that the reference to an "exclusion for under 30's" from the freeze on experience increments and mandatory time off - not a guarantee that the under 30's would receive a 1994 across the board salary *increase*. But OPLEA took these minutes to be confirmation that under 30's would continue to receive a 3 per cent across the board increase in 1994, in addition to salary increments and no time off.

50. On August 5, 1993, OPLEA issued another memo to its members recording OPLEA's understanding of the Library's position at that point. This memo suggests that the 3 per cent COLA increase is even more problematic - or, at least, that that was what the Library was telling OPLEA at that point. The memo includes these observations attributed to the Library with which Mr. Frappier concurred both *then*, and *now*:

. . . the legality of awarding the 3 per cent to those under \$30,000 and not those over \$30,000 was raised as a question. *Third, with the 3 per cent COLA and the increments for staff earning under \$30,000 being designated as a budgetary item, these are not safe from reconsideration during the budget deliberation.*

[emphasis added]

51. The emphasized portion of the memo indicates, quite clearly, that even for the “under 30’s” the 3 per cent COLA was problematic. Any amount earmarked for the under 30’s was still subject to City budgetary considerations. That was the position that the Library was communicating to OPLEA in early August 1993.

52. Mr. Frappier testified that as early as July - August, and *regardless of the Social Contract discussions*, the Library had made it clear to OPLEA that any monies payable to employees were subject to the fall budgeting process, and contingent upon approval and funding from the City. The Library was worried that the 1992 budget crunch could be respected in 1993.

53. This ambivalence is noted in a later OPLEA memo (September 10, 1993) that records the Library’s *assumption* that the City would renege on its promise to make funds available for the proposed 3 per cent COLA. OPLEA did not understand why the Library thought that the City would “renege”. But OPLEA does not dispute that this is what the Library warned OPLEA about at the time.

54. We find, therefore, that as early as July/August (three months before the application for certification) the Library Board was indicating that the 1994 salary increase was no longer a sure thing even for the under 30’s. And, consistent with that view, on September 3rd, Gilles Frappier warned a staff meeting as follows:

G. Frappier presented to HOS an overhead detailing the financial impact of the social contract, which provides for the equivalent of increments + 3% COLA for those earning more than \$30K - this amount will *not* be paid directly to employees but instead will be sent by the City to the Province towards OPL’s Social Contract obligation. *In addition, those earning less than \$30K are to actually receive increments + a POSSIBILITY of a 3% COLA. The overhead, based on current information, showed deficits forecast for 1993 (-\$64,352), 1994 (-\$55,132) and 1995 (-\$55,132). Furthermore, should the City not give future budget increases, the situation will become even worse. G. Frappier reminded people that job security was not guaranteed after 1994 and that serious operating cuts may have to be considered.* Copies of this overhead information will be distributed to HOS, as requested.

[emphasis added]

The Library was telling its management personnel, the same thing that it was telling OPLEA: the 3 per cent COLA increase for the under 30’s was no longer guaranteed, and the situation would become worse if the City decided to cut its budget further.

55. OPLEA thought otherwise because of the 11th hour discussions preceding the Social Contract deadline of August 10, 1993. In the course of those discussions, there was a common understanding that the under 30’s should be protected from the brunt of the Social Contract cut-backs. However, as we have already noted, the parties were not *ad idem* about the extent of that protection.

56. The Library anticipated protecting the under 30’s from having to take unpaid leave and from any loss of their salary increments based on experience. At the same time, the Library continued to believe that its ability to pay *either increments or the 3 per cent COLA* was contingent upon City funding (see the OPLEA memo of August 5th mentioned above). By contrast, OPLEA believed that the Social Contract discussions had resulted in *total immunity* for the under 30’s, with the result that they would still receive a 3 per cent annual increase in 1994.

57. The Social Contract discussions broke down about midnight on August 9th, the day before the deadline. Early the following morning, the parties resolved their differences by adopting, without discussion, the terms of the local social contract agreement that had just been reached

between the City and CUPE Local 503. The Library simply "borrowed" the plan that the City had concluded with CUPE, on the theory that if it was acceptable to the City, it must be appropriate for the Library too.

58. Each party believed that those terms reflected its own understanding of the situation. However, *there was no actual discussion of what the Social Contract terms might mean for the under 30's*. Ms. Hoermann regarded those terms as a guarantee of a 3 per cent raise in 1994. Mr. Frappier regarded that raise as a continuing *possibility*, that was still subject, as before, to the budgeting exercise that was to take place later in the fall. But it does not appear that either party focused specifically on the issue of the treatment of under 30's in 1994, nor did the Library seek clarification from the City of the meaning of the plan whose terms it was purportedly "borrowing".

59. How does the "borrowed" City/CUPE Social Contract plan actually deal with under 30's? Are the City's under 30's to get a salary increase beginning in January 1994 (OPLEA's current claim against the Library)? The situation is somewhat ambiguous because as we have already noted, the City does not have regular employees in this salary category.

60. The parties are agreed that, if called to testify, Mr. Carter, a union official, would recount his discussion during the City/CUPE Social Contract discussions with Joe Potter a City official. This is what Mr. Carter would say:

Mr. Carter will say that Joe Potter, spokesperson for the City in the local agreement negotiations, specifically agreed that the City will pay the 3% wage increase, and/or any applicable increments to all employees in the "under 30" category. However the parties have also agreed that it is difficult to predict with any accuracy the annual earnings of employees within this category. As a result, the parties have agreed to wait until the end of the year, when it will be clear how much these employees have earned. At that point, if there are any employees in the "under 30" category, the City will pay them their 3% and/or their increments, to bring their earnings up to a maximum of \$30,000.

Any payments to the City's under 30's would have to await an assessment of the situation at the end of 1994.

61. There were no similar discussions between OPLEA and the Library, nor any express undertaking about how the under 30's would be treated, nor even an express indication that the Library would treat *its* under 30's, the way the City dealt with its own under 30's. And the comparison is a little artificial in any event because the City may have no under 30's; and if it does, they will not get a salary adjustment until the end of 1994. Finally, there is no reason to doubt the Library's general situation (underlined by the experience of the previous year): the Library can only pay in salary, sums that the City provides and authorizes.

62. In the course of this proceeding, we heard no direct evidence from City officials. There is, therefore, no direct evidence that the City, as funding agency for the Library, ever considered the Library's Social Contract discussions, or ever turned its mind to the economic treatment of under 30's, or ever considered the number of under 30's on the Library employment rolls. However, in late fall of 1993 the City *did* impose budget restrictions (as it had done in the past) which had an impact on the Library's work force.

63. From May until October 1993 (and quite apart from Social Contract discussions) the Library was working on its 1994 operating budget, which was to be submitted to the City for its approval or revision, as had been done in the past. As late as July 1993, the Library still anticipated that the City's budgetary needs could be met by a modest tax increase. Among other things, such tax increase, levied by the City would fund the Library's request for the 3 per cent COLA that

its employees were expecting to receive in 1994. Later, the likelihood of a tax increase receded and the Library's expectations were reduced accordingly - hence the equivocation and talk of "possibilities" and warnings about budget review to which we have already referred.

64. From the Library's perspective, it was by no means clear that the Library's funding request would be approved in its entirety. And, as it turned out, it was not. The cut-backs foreseen by Mr. Frappier in September, came to pass in mid-December.

65. On September 17, 1993, the City advised its various "departments" including the Library, that in order to meet the City's targeted mill rate, departments were to draft options to reduce their budgets. This departmental "input" was to be received by the City by October 29, 1993. These departmental budgets were then reviewed by City officials, revised in the manner that such officials considered necessary, and incorporated into an overall City budget. That City budget was compiled, printed, and was eventually approved by City Council on December 13, 14 and 15, 1993.

66. The result for the Library was a reduction in its salary budget, making it impossible to pay the 3% COLA to the one half of its work force earning under \$30,000. As Mr. Frappier put it "... the 3 per cent isn't a pot of money that exists somewhere . . . the Library can't pay money that it doesn't have . . .". For whatever reasons, the City did not provide the funding necessary to support a wage increase for Library workers - although, as we have already noted, there is no evidence that the City was actually aware of, or took into account, the potential impact on the Library's "under 30's".

67. There is no evidence that the Library has ever paid more in salaries than the City has funded. Nor has the Library ever had to try to find "salary dollars" in other parts of its operating budget. The Library has paid what the City prescribes; and where the City has changed its funding priorities - as in 1992 - the Library has responded accordingly.

IV

68. When one considers the situation as a whole, we are satisfied that whatever approach one takes to the interpretation of section 81, this application must fail.

69. "Business as usual" for *this employer*, means responding to budget constraints imposed through the municipal structure of which the Library is an integral part (a department) - as happened in 1992. It has never meant paying more than the City has funded, or looking for "salary dollars" in other parts of its operating budget. Nor by the fall of 1993 would a reasonable employee conclude that a 3 per cent salary increase was an unequivocal undertaking, that would be forthcoming automatically, regardless of external or overall budgetary considerations. It is doubtful whether an informed Library employee could ever expect such unequivocal undertaking, given the events of the previous year. But, in any event, these particular employees were given ample indication that the COLA increase was not a "sure thing", but was contingent upon City approval and funding.

70. Turning to the words of the statute, it is difficult to construe this employee expectation as a settled "*term or condition of employment*" or an established "*employee right*", or a well entrenched "*privilege*" of the same order as those recorded in the employees' handbook. And as we have already noted, even established benefits had been unilaterally rescinded or modified by the Library the year before; moreover the alleged linkage to the City's under 30's (if there is any) is equivocal, and would seem to involve a decision by the City to defer consideration of their situation until the end of 1994.

71. Finally, from a purely collective bargaining perspective, an across the board 3 per cent wage increase for half the bargaining unit is the kind of thing that one would expect to be the subject of collective bargaining - particularly if meeting this union demand might require adjustment to other aspects of the Library's overall budget or salary budget. Paying the under 30's more, might require paying the over 30's *less*, or considering lay-offs, closures or some of the other responses that had been contemplated by the Library over the previous two years and Mr. Frappier was worried about in his communication to staff in September. But again, these are the sorts of things that one would expect to be the subject of collective bargaining.

72. This is not to say that the under 30's do not "deserve" a salary adjustment, or that an increase might not ultimately be forthcoming - particularly, if the City does intend to give special consideration to low wage workers within its organization. However, that outcome will be the result of *collective bargaining* - reflecting whatever trade offs are made within or between budget categories, whatever pressures or persuasion the union can bring to bear on the Library or the City, and perhaps the inclination of an interest arbitrator should "first contract arbitration" be sought under section 41 of the Act. However, in our view, that result for the "under 30's" does not flow from section 81 of the Act.

73. For the foregoing reasons, this application is dismissed.

COURT PROCEEDINGS

1097-94-R (Court File No. 78/95) Maidstone Manufacturing Inc. Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and Ontario Labour Relations Board, Respondents

Certification - Judicial Review - Reconsideration - Representation Vote - Board finding ballot cast in representation vote spoiled where ballot marked with heavy "X" in "No" circle and with light oblique line in "Yes" circle - Certificate issuing - Employer applying for reconsideration on ground that spoiled ballots should have been treated as "ballots cast" within meaning of section 9.1 of Act - Issue raised for first time in reconsideration application - Employer offering no reason why argument on ballots cast not raised earlier - Board also noting its established case law to effect that spoiled ballots are not included within "ballots cast" - Reconsideration application dismissed - Employer's application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court of Justice (Divisional Court), McMurtry C.J.O.C., Steele and Saunders J.J., March 23, 1995.

The Court (endorsement): This is an application for judicial review of decisions of the Ontario Labour Relations Board dated December 12th and 19th, 1994 and January 24th, 1995. In its decision dated December 12th, 1994 the Board granted a Certificate to the respondent Union after determining that the majority of ballots cast were in favour of the Union, having determined that a ballot which was in dispute was a spoiled ballot. The grounds for the application are that the Board erred as follows:

- (a) in concluding that a ballot which contained an 'X' in the NO circle and a line in YES circle was a spoiled ballot; and
- (b) in excluding spoiled ballots from the total of ballots cast for the purpose of determining whether more than fifty percent of the ballots cast were in favour of the Union.

The applicant submitted that both of these determinations were jurisdictional issues and that the standard of review is therefore one of correctness. Alternatively it was submitted that if the issues were not jurisdictional, their determination lay outside of the expertise of the Labour Board and there should be no curial deference. Further, in the alternative it was argued that the decisions were patently unreasonable.

In our view the correct standard of review is one of 'patently unreasonable'. The Supreme Court of Canada has clearly enunciated the question that the Courts should ask in such matters, namely, "Did the legislator intend such a matter to be within the jurisdiction conferred on the tribunal". In our view, any 'pragmatic and functional analysis' would demonstrate that the Legislature did intend to confer on the Labour Board the jurisdiction involving the determination of union certification votes.

In *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, Beetz J. noted at p. 1086:

1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review.

We also consider it appropriate to quote from the decision of *Attorney General (Canada) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) where Cory J wrote at p. 689:

Why should there be deferential treatment of this board by the courts?

There are a number of reasons why the decisions of the Board made within its jurisdiction should be treated with deference by the court. First, Parliament in the Act creating the Board has by the privative clause indicated that the decision of the Board is to be final. Secondly, recognition must be given to the fact that the Board is composed of experts who are representative of both labour and management. They are aware of the intricacy of labour relations and the delicate balance that must be preserved between the parties for the benefit of society. These experts will often have earned by their merit the confidence of the parties. Each time the court interferes with a decision of such a tribunal confidence is lost not only by parties which must appear before the Board but by the community at large. Further, one of the greatest advantages of the Board is the speed in which it can hold a hearing and render a decision. If courts were to interfere with decisions of the Board on a routine basis, victory would always go to the party better able to afford the delay and to fund the endless litigation. The court system itself would suffer unacceptable delays resulting from the increased case-load if it were to attempt to undertake a routine review.

The applicant submits that the ballot with a clear 'X' in the NO circle, and with a slight upward line through the YES circle should have been counted as NO vote and that it was patently unreasonable to rule otherwise. Furthermore the instructions on the ballot clearly stated that the employee was to "make and X in the circle beside your choice". The Board was unanimous in its decision to treat the ballot as a spoiled ballot. While the decision of the Board is certainly open to argument, it was based on some evidence and we cannot find it to be patently unreasonable. In this respect the observations of the Alberta Court of Appeal in the *Airtex Manufacturing Partnerships* case are relevant and appropriate:

Lastly, it is at least possible that the Board has, or is thought by the Legislature to have, practical expertise about any situational reasons why ballots in shop floor votes may be deliberately

spoiled, and this might be a good aid to interpretations. We think in conclusion, that a privative gloss defends this decision.

In respect to whether the Board's determination that "ballots cast" does not include spoiled ballots, we are also of the opinion that the Board's interpretation of s.9.1(1) of the *Labour Relations Act* was not patently unreasonable. In the *Arrow Timber Co. Limited and Lumber and Sawmill Workers Union et al.*, [1973] 3 O.R. 285 (Div. Ct.), the Divisional Court stated at page 288:

It seems to us to be quite clear that the determination as to whether spoiled ballots were valid ballots cast was adjectival and necessary in order to enable the Board to determine the question of certification with which it is entrusted indisputably. This I think is sufficient to dispose of the matter.

In our view the more recent decisions of the Supreme Court of Canada do not persuade us that the reasoning in *Arrow Timber* should be reversed. We are also assisted by the Alberta Court of Appeal in the *Airtex Manufacturing Partnership and Labour Relations Board of Alberta et al* (1991), 82 D.L.R. (4th) 124 (Alta. C.A.) case where the Court stated at p. 128:

This takes us to the last issue, whether the interpretation placed by the board on the words "ballots cast" meets the standard. The board said that spoiled ballots should not be counted at all, not in the calculation of votes for and against representation, nor in the calculation of what amounts to a majority. This conclusion accepted that the words "ballots cast" mean "ballots effectively cast".

In our view, the term under review raises a difficult interpretive issue. The legislature expressly did not require a majority of those eligible to vote on the issue to decide it. Those whose chose not to enter the voting booth were thus excluded in deciding what number was a "majority". A consequential issue inevitably arose about exclusion also of those who voted ineffectively or who took a ballot but deliberately spoiled it. To count spoiled ballots in calculating the figure needed for a majority would be to treat all spoiled ballots as negative votes.

Mr. Laird argued that, both by the dictionary and in the context, the word "ballot" plainly means the piece of paper the voter put in the box, whether it was valid or not. He protested eloquently that the board had added a word to the legislation by requiring that the ballot be "valid". we accept that the literal meaning of ballot is its ordinary meaning, but it is sometimes used in another sense.

The function of interpretation is to find the meaning that reflects the legislative object provided the words employed can reasonably bear it. This was what the board sought to do, and we cannot say that its conclusion was unreasonable.

While wording of the Alberta statute is broader than that of Ontario, it is our view that the principle is the same.

In conclusion we are also of the opinion that there was clearly some basis for the Board's decision to exercise its discretion to reject the Employer's request for reconsideration, in that the request was based upon legal submission which were not contained in the Employers' statement of representations following the vote, and were not raised during the hearing which was specifically held to consider the parties' submissions in respect of the vote.

The application is therefore dismissed. The respondent Union is entitled to recover costs of the application from the applicant, fixed in the amount of \$4,500.00

0769-92-M (Court File No. 313/94) Labourers' International Union of North America, Ontario Provincial District Council Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 18, Coopers & Lybrand Limited, Trustee of the Estate of **Matthews Contracting Inc.**, A Bankrupt and The Ontario Labour Relations Board, Respondents

Construction Industry - Judicial Review - Sector Determination - Board finding construction of underground concrete water storage tank to be work in ICI sector of construction industry, and not in heavy engineering sector or sewer and watermains sector as asserted by Labourers' union - Declaration issuing accordingly - Labourers' application for judicial review dismissed by Divisional Court

Board Decision reported at [1993] OLRB Rep. Dec. 1332.

Ontario Court of Justice (Divisional Court), Saunders, Rosenberg and Then JJ., March 2, 1995.

Saunders J. (Orally): The respondent employer, having become bankrupt, and the project, having been completed, there can be no direct consequences to any party from this application for judicial review. The issue decided by the Board, however, is ongoing between the applicant and the respondent unions and the adversary aspect of it has not diminished and remains present. While, prior to hearing argument, it is not possible to determine the effect of a decision of this court, there is a real possibility that a decision might be helpful to the Board and to the parties in determining future sector issues. For the reasons of this court in *Electrical Power Construction Systems Association v. Ontario Allied Construction Trades Council* (1993), 12 O.R. (3d) 768, we concluded that it was appropriate to exercise our discretion to hear the application.

Turning to the merits of the application, the Board found that the subject tank was part of a sewage treatment process and, hence, was in the I.C.I. sector, although the tank was located many miles from the treatment plant. The construction of the tank was a large project and, while its main purpose was to store water, it also performed a sludge removal function and had a pumping station as part of its equipment. The function of the tank in controlling intake into the sewage treatment plant was, in the view of the Board, a factor in determining that it was part of the treatment process.

While we would not have necessarily reached the same conclusion, we are not persuaded that the decision of the Board was patently unreasonable and, accordingly, the application should be dismissed.

Rosenberg J. (Orally): While I agree with the other members of the court in the result, I feel that I should add something with regard to whether or not we should have heard this matter at all, the contractor having been bankrupt and the issue, therefore, moot. While I agree that, in cases of this kind, the matter will often be moot by the time it reaches the court, I feel that, under the test that I will be referring to, we should not have exercised our discretion to hear the matter.

The case referred to by Saunders J. was a question of a decision on the jurisdiction of the Board and, no doubt, as decided by the Chief Justice, could be a valuable precedent in determining the Board's jurisdiction in other similar situations.

In this case what, with hindsight, has been the result of our deliberations, is a finding that one interpretation by the Board is not patently unreasonable. That is not necessarily an indication that any other interpretation would not withstand the same scrutiny. This is particularly relevant in this

situation because the Board itself is not bound by the doctrine of *stare decisis*. The test with regard to whether or not the court should exercise its jurisdiction to hear a matter that has become moot is set out in the case of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

Applying the test in *Borowski (supra)* to the present case, it is my view that either way that this matter is decided, or was decided, the next time the issue appears, it will be decided on the peculiar facts of the situation. The facts will never be identical to the present facts. It will be open to the Board because it is not bound by *stare decisis* to make a fresh assessment in light of the evidence before it on that occasion. Accordingly, I would not have proceeded with the hearing.

2916-93-M; 2957-93-U (Court File No. 119/94) The Great Atlantic & Pacific Company of Canada, Limited Applicant v. United Food and Commercial Workers International Union, Locals 175 and 533, Brian Donaghy, Darrin Fay, Frank Fortunato, Rick Fox, Helmut Halla, Robert Liotti, Donald Lupton, Gene Martin, Pam Murdock, Patricia O'Doherty, Kathy Papconstantino, Irene Park, Cliff Skinner and Ontario Labour Relations Board, Respondent

Judicial Review - Picketing - Strike - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed - Employer applying for judicial review - Union moving to strike out affidavit filed by employer in pending application for judicial review on basis that it is admissible - Divisional Court ordering that affidavit be struck

Board decision reported at [1994] OLRB Rep. March 303.

Ontario Court of Justice (Divisional Court), White J., March 1, 1995.

White J.: This is a motion to strike out the affidavit of Keith Billings sworn Sept. 20, 1994, on a pending application for judicial review on the basis that it is inadmissible.

The affidavit of Keith Billings is found at tab 2 of the Motion Record. It purports to identify the affidavit evidence, with exceptions and amendments, as stipulated by counsel that was before the OLRB (against which judicial review is sought, pertinent to its relevant decision in the matter at bar.)

The Record provided by the OLRB to this Court indicates that the OLRB relied as evidence on affidavits, save as to those portions upon which counsel could not agree, and also on *viva voce* evidence called by the Company (see para 2, p. 2 of Decision of O.L.R.B. dated Feb. 16, 1994 as found in the Record provided by O.L.R.B.).

Mr. Billings' affidavit does not raise any issue going to the jurisdiction of the OLRB - for example

that it made a determination of fact without evidence, that it breached natural justice, or that it was biased etc. The affidavit of Mr. Billings, if not completely redundant and thus both embarrassing and vexatious, would seem to be directed to showing that the OLRB made improper inferences on evidence that was properly before it. This latter consideration is relevant to the process of appeal - not the process of judicial review. Since the affidavit of Mr. Billings does not go to jurisdictional error committed by the OLRB in the matter at hand, the substantive application for judicial review, it should not form part of the record to go before the Divisional Court in that application.

I agree with the thoughts of Carruthers J. expressed on p. 3 of his reasons in *Crown in Right of Ontario & Ontario Public Service Employees Union (Auger - Beaulieu) et al*, unreported decision dated May 19, 1994 (Divisional Court) as to the prudence in striking out an offending affidavit prior to the application for judicial review coming before the panel of the Divisional Court.

An order will therefore go, as asked, striking out the affidavit of Keith Billings. The costs of this motion I fix at \$750.00 and these costs are to be paid by the applicant for judicial review (the responding party on this motion) to the respondents in the application for judicial review (the moving parties in this motion) upon completion of the application for judicial review.

No costs are allowed to the O.L.R.B. in respect of the appearance of its counsel on this motion, and in respect of his valuable participation therein.

CASE LISTINGS FEBRUARY 1995

PAGE

1.	Applications for Certification	51
2.	Applications for Combination of Bargaining Units	62
3.	Applications for First Contract Arbitration	63
4.	Applications for Declaration of Related Employer	63
5.	Sale of a Business	64
6.	Union Successor Rights	65
7.	Section 64.2 - Successor Rights/Contract Services	65
8.	Applications for Declaration Terminating Bargaining Rights	65
9.	Ministerial Reference	66
10.	Applications for Declaration of Unlawful Lockout	66
11.	Applications Concerning Replacement Workers	66
12.	Complaints of Unfair Labour Practice	66
13.	Applications for Interim Order	70
14.	Jurisdictional Disputes	70
15.	Complaints under the Occupational Health and Safety Act	70
16.	Construction Industry Grievances	71
17.	Applications for Reconsideration of Board's Decision	73

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1995

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0857-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers and construction labourers in all sectors of the construction industry in the Townships of Armstrong, Evanturel, Ingram, Hilliard, Harley, Kerns, Henwood, Beauchamp and Dack in the District of Temiskaming, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (4 employees in unit)

1147-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers and construction labourers in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson." (19 employees in unit)

3730-93-R: Canadian Union of Public Employees, Local 79 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent)

Unit: "all security guards employed by the Municipality of Metropolitan Toronto in the Municipality of Metropolitan Toronto, save and except shift forepersons, persons above the rank of shift foreperson, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of February 1, 1994" (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0803-94-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Hogarth-Westmount Hospital (Respondent)

Unit: "all office and clerical employees of Hogarth-Westmount Hospital in the City of Thunder Bay, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Executive Director, Stores Supervisor, Financial Accounting Clerk, Human Resources Benefits Officer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit)

2303-94-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Wm. Reynolds & Sons Metal Fabricators Ltd. (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of Wm. Reynolds & Sons Metal Fabricators Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of Wm. Reynolds & Sons Metal Fabricators Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sec-

tor, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2457-94-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ron Sayers Plastering & Drywall Ltd. (Respondent)

Unit: "all painters and painters apprentices in the employ of Ron Sayers Plastering & Drywall Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters apprentices in the employ of Ron Sayers Plastering & Drywall Ltd., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Clarity Note*)

2630-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Don Valley Brewing Company (1990) Limited c.o.b. Connors Brewery (Respondent)

Unit: "all employees of Don Valley Brewing Company (1990) Limited c.o.b. Connors Brewery in the City of St. Catharines, save and except managers, persons above the rank of manager, office, clerical and sales staff" (20 employees in unit)

2788-94-R: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicants) v. 1064953 Ontario Inc. c.o.b. as Apex Sheet Metal and Khan Mechanical Services Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and sheet metal apprentices in the employ of 1064953 Ontario Inc. c.o.b. as Apex Sheet Metal and Khan Mechanical Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2872-94-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicants) v. Teal Industrial Contractors Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Teal Industrial Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Teal Industrial Contractors Inc. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), and in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2989-94-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Frade's Fruit Ltd. (Respondent)

Unit: "all employees of Frade's Fruit Ltd. in the City of Thunder Bay, save and except Assistant Managers, persons above the rank of Assistant Manager and Bookkeepers" (17 employees in unit)

3182-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. employed at the Britannia Six Theatre in the City of Ottawa, save and except Assistant Managers, persons above the rank of Assistant Manager and persons for whom any trade union held bargaining rights as of December 5, 1994" (32 employees in unit) (*Having regard to the agreement of the parties*)

3232-94-R: Amalgamated Clothing and Textile Workers' Union, AFL-CIO, CLC (Applicant) v. Z-Lite-Jenamees (Respondent)

Unit: "all employees of Z-Lite-Jenamees in the City of Woodstock save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

3234-94-R: United Steelworkers of America (Applicant) v. Elgin Labour Centre Inc. (Respondent)

Unit: "all employees of Elgin Labour Centre Inc., in the County of Elgin, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

3241-94-R: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Ed Walker's Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Ed Walker's Electric Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Ed Walker's Electric Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3318-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eastern Power Developers Corp. (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Labourers' International Union of North America, Local 506 (Intervenors)

Unit: "all electricians and electricians' apprentices in the employ of Eastern Power Developers Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Eastern Power Developers Corp. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3487-94-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Valley East (Respondent)

Unit: "all employees of The Corporation of the Town of Valley East at the Recreation Centre and the Town Hall in the Town of Valley East regularly employed for not more than twenty-four hours per week, save and except Pool Supervisor, Program Supervisor, Forepersons and persons above the rank of foreperson, Deputy Clerk, Administrative Secretary and students employed during the school vacation period and persons for whom any trade union held bargaining rights as of the date of application, January 5, 1995" (37 employees in unit) (*Having regard to the agreement of the parties*)

3527-94-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Ainsworth Technologies Inc. (Respondent)

Unit: "all employees of Ainsworth Technologies Inc. in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3544-94-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Tilden Car Rental Inc. (Respondent)

Unit: "all garage employees of Tilden Car Rental Inc. in the Municipality of Metropolitan Toronto and the City of Mississauga, regularly employed for not more than 24 hours per week and students employed during

the school vacation period, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of January 11, 1995” (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3557-94-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Pino Drywall Construction Limited (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Pino Drywall Construction Limited in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

3559-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hamilton-Wentworth Roman Catholic Separate School Board (Respondent) v. The Cleaners Assoc. of the Hamilton-Wentworth Separate School Board (Intervener)

Unit: “all employees of the Hamilton-Wentworth Roman Catholic Separate School Board employed as cleaners in the Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (154 employees in unit) (*Having regard to the agreement of the parties*)

3560-94-R: Teamsters Local Union No. 879 (Applicant) v. Boreal Laboratories Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Boreal Laboratories Ltd. in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office staff, sales staff, and persons employed pursuant to a Cooperative Education Program sponsored by a college, university or high school” (24 employees in unit) (*Having regard to the agreement of the parties*)

3573-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. New Edinburgh Square Inc. (Respondent)

Unit: “all registered, graduate and undergraduate nurses employed by New Edinburgh Square Inc. in the City of Ottawa, save and except the Night Shift Supervisor, persons above the rank of Night Shift Supervisor and persons for whom any trade union held bargaining rights as of January 12, 1995” (5 employees in unit) (*Having regard to the agreement of the parties*)

3586-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hotel Plaza II (Respondent)

Unit: “all employees of Hotel Plaza II in the City of Toronto, employed as Front Desk Clerk, Front Desk Clerk/Night Auditor, Night Auditor, Reservationist and Concierge, save and except Supervisors and persons above the rank of Supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

3588-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Forte-King Edward Ltd. (Respondent)

Unit: “all front desk employees of Forte-King Edward Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, management trainees, office, clerical and sales staff, reservations staff, audit staff, accounting staff, cashiers and security staff” (6 employees in unit) (*Having regard to the agreement of the parties*)

3646-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent)

Unit: “all employees of K & Son Maintenance Co. Inc. at 4900 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, temporary employees, office and clerical staff” (21 employees in unit) (*Having regard to the agreement of the parties*)

3653-94-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Amoco Fabrics and Fibers Ltd. (Respondent)

Unit: "all employees of Amoco Fabrics and Fibers Ltd. at its existing operations in Brant County, regularly employed for not more than 24 hours per week and all students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and security guards" (16 employees in unit) (*Having regard to the agreement of the parties*)

3659-94-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all employees of The Board of Education for the City of Toronto in the Department of Special Education, in the Municipality of Metropolitan Toronto employed as Health Care Assistants, save and except Superintendents, persons above the rank of Superintendent and any persons for whom a trade union held bargaining rights on January 18, 1995," (30 employees in unit) (*Having regard to the agreement of the parties*)

3665-94-R: Ontario Public Service Employees Union (Applicant) v. Children's Aid Society of Metropolitan Toronto (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all employees of the Children's Aid Society of Metropolitan Toronto in the Municipality of Metropolitan Toronto, who are entitled to practice law in Ontario and are employed in their professional legal capacity, save and except Chief Counsel, persons above the rank of Chief Counsel, and employees in bargaining units for which any trade union held bargaining rights as of January 18, 1995" (8 employees in unit) (*Having regard to the agreement of the parties*)

3686-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation engaged in cleaning and maintenance at Marathon Aviation Terminals Air Cargo Buildings B and E, Area 4, Lester B. Pearson International Airport, Toronto, save and except non-working supervisors, persons above the rank of non-working supervisor, office and clerical staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

3694-94-R: United Steelworkers of America (Applicant) v. Bramalea Centres Limited (Respondent)

Unit: "all Security Guards employed by Bramalea Centres Limited at Yorkdale Shopping Centre and Yorkdale Place in the Municipality of Metropolitan Toronto, save and except security manager, security supervisors, office and clerical staff, customer service employees, maintenance and food court employees, persons above the rank of supervisor, persons in bargaining units for whom any trade union held bargaining rights as of January 20, 1995" (25 employees in unit) (*Having regard to the agreement of the parties*)

3716-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Niagara Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Niagara Branch in the Region of Niagara, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (36 employees in unit) (*Having regard to the agreement of the parties*)

3718-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Oxford Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity by the Victorian Order of Nurses Oxford Branch in the County of Oxford, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

3721-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Mannex Systems Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Mannex Systems Inc. in the industrial,

commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Mannex Systems Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3722-94-R: Canadian Union of Public Employees (Applicant) v. Manitoulin Board of Education (Respondent)

Unit: "all employees of the Manitoulin Board of Education in the District of Manitoulin employed as Educational Assistants, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of January 23, 1995" (10 employees in unit) (*Having regard to the agreement of the parties*)

3730-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Corporation of the Township of Ear Falls (Respondent)

Unit: "all employees of The Corporation of the Township of Ear Falls, save and except Supervisors and persons above the rank of Supervisor" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3751-94-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Limited (Respondent)

Unit: "all employees of Intertec Security & Investigation Limited at 90 Eglinton Avenue East in the City of Toronto, 3495 Lawrence Avenue East in the City of Scarborough, 22 & 32 Clarisa Drive and 10 Trench Street in the Town of Richmond Hill and 596 Davis Drive in the Town of Newmarket, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (26 employees in unit) (*Having regard to the agreement of the parties*)

3752-94-R: Service Employees' Union, Local 478 (Applicant) v. Extendicare (Canada) Inc. (Respondent)

Unit: "all office and clerical employees of Extendicare (Canada) Inc. in the Town of Kirkland Lake, save and except Supervisors, persons above the rank of Supervisor, Registered Nurses, Physiotherapists, Occupational Therapists, Office Co-ordinator and persons for whom any trade union held bargaining rights as of January 20, 1995" (4 employees in unit) (*Having regard to the agreement of the parties*)

3760-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Boss Towing Ltd. (Respondent)

Unit: "all owner-operators, towtruck drivers and dispatchers employed by Boss Towing Ltd. in the Town of Woodbridge, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3761-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Blackwood Towing (Respondent)

Unit: "all owner-operators, tow truck drivers and dispatchers employed by Blackwood Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3762-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. ML Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by ML Towing in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3763-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Andre’s Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Andre’s Towing in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3765-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Advance Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Advance Towing in the Town of Richmond Hill, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3767-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Four-O-One Towing (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Four-O-One Towing in the City of Scarborough, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3768-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Lightning Towing Ltd. (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Lightning Towing Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3769-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Rexdale Towing and Storage (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Rexdale Towing and Storage in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3771-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Vales Towing and Storage (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Vales Towing and Storage in the City of Scarborough, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3772-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Krystal Towing Inc. (Respondent)

Unit: “all owner-operators, tow truck drivers and dispatchers employed by Krystal Towing Inc. in the City of

Scarborough, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and accounting staff" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3778-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc., engaged in cleaning services at 740 Progress Avenue in the City of Scarborough, save and except working forepersons, persons above the rank of working foreperson, office, clerical and sales staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

3779-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc. engaged in cleaning services at 2206 Eglinton Avenue East in the City of Scarborough, save and except working forepersons, persons above the rank of working foreperson, office, clerical and sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

3780-94-R: United Steelworkers of America (Applicant) v. TCG International Inc. (Respondent)

Unit: "all employees of TCG International Inc. at its Autostock Distribution Division in the City of London, save and except supervisors, persons above the rank of supervisor, dispatchers, office and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

3795-94-R: Alliance Employees' Union (Applicant) v. Union of National Defence Employees (Respondent)

Unit: "all employees of the Union of National Defence Employees in the City of Ottawa, save and except National President, persons above rank of National President and persons for whom any trade union held bargaining rights as of January 27, 1995" (11 employees in unit) (*Having regard to the agreement of the parties*)

3796-94-R: Alliance Employees' Union (Applicant) v. Customs Excise Union Douanes Accise (Respondent)

Unit: "all employees of Customs Excise Union Douanes Accise in the City of Ottawa, save and except National President, persons above the rank of National President, Secretary to the National President and persons for whom any trade union held bargaining rights as of January 27, 1995" (6 employees in unit) (*Having regard to the agreement of the parties*)

3798-94-R: United Steelworkers of America (Applicant) v. Market Drive Donuts Ltd., c.o.b. as Tim Horton Donuts (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Market Drive Donuts Ltd., c.o.b. as Tim Horton Donuts in the Town of Milton, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (61 employees in unit) (*Having regard to the agreement of the parties*)

3816-94-R: Public Service Alliance of Canada (Applicant) v. Metcalfe Realty Company Limited (Respondent)

Unit: "all employees in the Operations Department of Metcalfe Realty Company Limited working in the Regional Municipality of Ottawa-Carleton, save and except Building Managers, persons above the rank of Building Manager, Parking Co-ordinator, Cleaning Inspector and Superintendent" (29 employees in unit) (*Having regard to the agreement of the parties*)

3818-94-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. W. R. Industries Limited (Respondent)

Unit: "all employees of W. R. Industries Limited in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (134 employees in unit)

3826-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses Peterborough-Victoria & Haliburton Branch (Respondent)

Unit: “all Registered and Graduate Practical Nurses employed in a nursing capacity by the Victorian Order of Nurses Peterborough - Victoria & Haliburton Branch in the Counties of Peterborough, Victoria and Haliburton, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (39 employees in unit) (*Having regard to the agreement of the parties*)

3836-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at 243, 245, 251 and 255 Consumers Road in the City of North York, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3837-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. engaged in cleaning services at 3700 Steeles Avenue West in the Town of Vaughan, save and except working forepersons, persons above the rank of working foreperson, office, clerical and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

3838-94-R: Service Employees’ Union, Local 210 (Applicant) v. 947482 Ontario Limited o/a Sarah Johnston Residence (Respondent)

Unit: “all employees of 947482 Ontario Limited o/a Sarah Johnston Residence in the Town of Blenheim, save and except Supervisors, persons above the rank of Supervisor, Bookkeeper and Registered and Graduate Nurses” (16 employees in unit) (*Having regard to the agreement of the parties*)

3840-94-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited o/a Martin Building Maintenance (Respondent)

Unit: “all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance employed at CFPL-TV, 1 Communications Road, in the City of London, save and except non-working supervisors, persons above the rank of non-working supervisors, office and sales staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

3861-94-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Double M & M Inc. (Respondent)

Unit: “all employees of Double M & M Inc. employed at Ridgetown College of Agricultural Technology, Main Street in the Town of Ridgetown, save and except non-working supervisors and persons above the rank of non-working supervisor” (10 employees in unit) (*Having regard to the agreement of the parties*)

3876-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 320 Bay Street in the Municipality of Metropolitan Toronto, save and except forepersons and persons above the rank of foreperson” (8 employees in unit) (*Having regard to the agreement of the parties*)

3892-94-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. The Hostess Frito-Lay Company (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the Hostess Frito-Lay Company in the City of St. Catharines, save and except Supervisors, persons above the rank of Supervisor and office staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

3906-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses (Respondent)

Unit: "all Registered and Graduate Practical Nurses employed in a nursing capacity by the Victorian Order of Nurses - Sudbury Branch in the Regional Municipality of Sudbury, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff" (44 employees in unit) (*Having regard to the agreement of the parties*)

3907-94-R: Graphic Communications International Union, Local 500M (Applicant) v. Signature Printing Inc. (Respondent)

Unit: "all employees of Signature Printing Inc. in the Municipality of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foreman, office, clerical and sales staff and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote**2393-94-R: Ontario Public Service Employees Union (Applicant) v. The Governing Council of the University of Toronto (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)**

Unit: "all full-time and part-time Security Officers or Security Guards in the employ of The Governing Council of the University of Toronto, save and except Sergeants and persons above the rank of Sergeant," (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	38
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	36
Number of ballots marked in favour of intervener	2
Number of ballots segregated and not counted	0

3043-94-R: Canadian Union of Public Employees (Applicant) v. Carleton University (Respondent) v. Carleton University Academic Staff Association (Intervener)

Unit: "all employees of Carleton University in the Regional Municipality of Ottawa-Carleton employed as sessional lecturers, and non-credit language teachers in the Centre for Applied Language Studies (CALS), save and except retired academic staff and professional librarians who, prior to their retirement, had an academic appointment at Carleton University, and employees in bargaining units for whom any trade union held bargaining rights as of November 24, 1994" (270 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	243
Number of persons who cast ballots	125
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	121
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	107
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	3

3225-94-R: Brewery, General and Professional Workers' Union (Applicant) v. Service Employees International Union, Service Employees International Union, Local 204 (Respondent)

Unit: "all employees of the Service Employees International Union, Service Employees International Union, Local 204 engaged in the business of Local 204, save and except supervisors, (including First Vice-President, Second Vice-President, Secretary Treasurer, and Recording Secretary), persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (19 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	13
Number of ballots marked in favour of intervener	1

3247-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. The Hamilton-Wentworth Roman Catholic Separate School Board (Respondent) v. The Hamilton-Wentworth Roman Catholic Caretakers and Maintenance Employees' Association (Intervener)

Unit: "all employees of Hamilton-Wentworth Roman Catholic Separate School Board employed in maintenance services and plant operations, save and except Area Managers, Maintenance Supervisor, Construction Supervisor, persons above the rank of Area Manager, Maintenance Supervisor, Construction Supervisor, office and clerical employees and cleaners" (158 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	171
Number of persons who cast ballots	151
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	150
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	81
Number of ballots marked in favour of intervener	68

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2339-94-R: IWA-Canada (Applicant) v. Leo Sakata Electronics (Canada) Ltd. (Respondent)

Unit: "all employees of Leo Sakata Electronics (Canada) Ltd. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, sales staff, office and clerical staff" (123 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	97
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	82
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	55
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	11

3024-94-R: United Steelworkers of America (Applicant) v. Oryx Fixtures Inc. (Respondent)

Unit: "all office, clerical and technical employees of Oryx Fixtures Inc. in the City of Barrie, save and except Managers, persons above the rank of Manager, Accountant and persons for whom any trade union held bargaining rights prior to November 23, 1994" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2

Applications for Certification Dismissed Without Vote

3606-94-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Vic Murai Holdings Ltd., c.o.b. as Canadian Tire (Respondent) v. Group of Employees (Objectors)

3662-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

3725-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. 519807 Ontario Ltd. c.o.b. as Howard Bus Service Ltd. (Respondent)

3926-94-R: International Brotherhood of Electrical Workers Local 402 (Applicant) v. Tramin Limited (Respondent)

Applications for Certification Withdrawn

3066-92-R: United Brotherhood of Carpenters and Joiners of America Local 2041 (Applicant) v. GR Drywall Acoustic (Respondent)

3545-94-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. J.V.H. Masonry Ltd. (Respondent)

3717-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses South Renfrew Branch (Respondent)

3770-94-R: Laundry, Linen Drivers and Industrial Workers Union Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Alpha Towing (Respondent)

3839-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Dixon Drywall & Acoustics Inc. (Respondent)

3886-94-R: United Food & Commercial Workers International Union (Applicant) v. Manitoulin Live Stock Co-Operative (Respondent)

3887-94-R: HESEU Hospitality Employees Service Employees Union of Canada (Applicant) v. Restauronics Services Inc. c.o.b. O.P.S.E.U. Cafeteria (Respondent) v. Hotel Employees Restaurant Employees Union Local 75 (Intervener)

3894-94-R: United Steelworkers of America (Applicant) v. Steve Kirman's Music Limited c.o.b. as Steve's Music Store (Respondent)

3975-94-R: United Food and Commercial Workers International Union (Applicant) v. Jones Valu-Mart (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3720-93-R: FMG Timberjack Inc. (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) (*Granted*)

3731-93-R: Canadian Union of Public Employees, Local 79 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) (*Dismissed*)

2222-94-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Appli-

cant) v. Canadian Linen Supply Co. Ltd., Canadian Linen Supply Co. Ltd. c.o.b. as Total Service, Metro Industrial Linen Supply, Red Rug (Respondent) (*Granted*)

2878-94-R: Service Employees' Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership c.o.b. as Seaforth Manor Nursing Home (Respondent) (*Withdrawn*)

3304-94-R: Lakehead District Roman Catholic Separate School Board (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) (*Endorsed Settlement*)

3486-94-R: Canadian Union of Public Employees and its Local 1742 (Applicant) v. The Shaver Hospital (Respondent) (*Granted*)

3587-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Hotel Plaza II (Respondent) (*Granted*)

3589-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Forte-King Edward Ltd. (Respondent) (*Granted*)

3654-94-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Amoco Fabrics and Fibers Ltd. (Respondent) (*Granted*)

3678-94-R: Ensign Security Services Inc. (Applicant) v. Canadian Security Union (Respondent) (*Granted*)

3791-94-R: The Board of Education for the City of Toronto (Applicant) v. Canadian Union of Public Employees, Canadian Union of Public Employees, Local 3111 (Respondents) (*Granted*)

FIRST AGREEMENT - DIRECTION

3468-94-FC: IWA-Canada, Local 1-1000 (Applicant) v. Colquhoun Audio Laboratories Limited (Respondent) (*Withdrawn*)

3810-94-FC: Service Employees Union, Local 210 (Applicant) v. The Corporation of the Ursuline Religious of the Diocese of London, c.o.b. as Glengarda Child & Family Services (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2731-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Symetrical Drywall Interiors Limited, Tacapa Land Company Ltd. (Respondents) (*Granted*)

0876-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Mapleton Electric Limited and/or Maza Electric Ltd. and/or Augusto De Sousa c.o.b. as A.S. Electric and/or Mar Mar Electric Limited and/or DMZ Electric Ltd. (Respondents) (*Endorsed Settlement*)

2033-94-R: International Union of Bricklayers and Allied Craftsmen, Local 4 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Regional Masonry & Contracting Ltd., also known as Regional Masonry Contracting, also known as Regional Masonry, also known as 695991 Ontario Limited T/A Regional Masonry Contracting, also known as 695991 Ontario Limited c.o.b. as Original Masonry Contracting, also known as Pietro Aiello c.o.b. as Regional Masonry Contracting and Mario Aiello c.o.b. as Regional Masonry Contracting, also known as Regional Masonry, also known as Regional Masonry & Contracting Ltd. (Respondents) (*Withdrawn*)

2376-94-R: Ontario Provincial Council of the International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Manz Contracting Services Inc., Chrysler Canada Ltd. (Respondents) v. National Automobile, Aerospace, Transportation and General Workers of Union and its Local 444 (Intervener) (*Withdrawn*)

2462-94-R: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. North West Diesel Power Ltd. and/or NWD Diesel Power Ltd. and/or NW Diesel Power Ltd. (Respondents) (*Granted*)

3410-94-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. 1064953 Ontario Inc. c.o.b. as Apex Sheet Metal and Khan Mechanical Services Ltd. (Respondent) (*Granted*)

3429-94-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. 452918 Ontario Ltd. operating as Agincourt Drywall and Agincourt Drywall Limited and 740783 Ontario Inc. operating as Whitby Drywall (Respondents) (*Endorsed Settlement*)

3438-94-R: Sheet Metal Workers' International Association, Local 473 (Applicant) v. G.N.I. Construction Ltd., #515422 Ontario Limited, c.o.b. as Woodstock Roofing and Sheet Metal, Great Northern Industries Inc. (Respondents) (*Granted*)

3819-94-R: Albert Zippoli (Applicant) v. Wilson's Truck Lines Ltd. (Respondent) (*Dismissed*)

3833-94-R: Thompson Products Employees' Association (Applicant) v. TRW Canada Limited Linkage & Suspension Division and Tora Investments Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2732-92-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Symetrical Drywall Interiors Limited and Tacapa Land Company Ltd. (Respondents) (*Terminated*)

0876-94-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Mapleton Electric Limited and/or Maza Electric Ltd. and/or Augusto De Sousa c.o.b. as A.S. Electric and/or Mar Mar Electric Limited and/or DMZ Electric Ltd. (Respondents) (*Endorsed Settlement*)

1721-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Speedvale Pharmacy carrying on business as 642883 Ontario Inc. (Respondent) (*Endorsed Settlement*)

2033-94-R: International Union of Bricklayers and Allied Craftsmen, Local 4 and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Regional Masonry & Contracting Ltd., also known as Regional Masonry Contracting, also known as Regional Masonry, also known as 695991 Ontario Limited T/A Regional Masonry Contracting, also known as 695991 Ontario Limited c.o.b. as Original Masonry Contracting, also known as Pietro Aiello c.o.b. as Regional Masonry Contracting and Mario Aiello c.o.b. as Regional Masonry Contracting, also known as Regional Masonry, also known as Regional Masonry & Contracting Ltd. (Respondents) (*Withdrawn*)

2376-94-R: Ontario Provincial Council of the International Brotherhood of Painters and Allied Trades, International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Manz Contracting Services Inc., Chrysler Canada Ltd. (Respondents) v. Canadian Auto Workers Local 444 (Intervener) (*Withdrawn*)

2462-94-R: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. North West Diesel Power Ltd. and/or NWD Diesel Power Ltd. and/or NW Diesel Power Ltd. (Respondents) (*Granted*)

3429-94-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. 452918 Ontario Ltd. operating as Agincourt Drywall and Agincourt Drywall Limited and 740783 Ontario Inc. operating as Whitby Drywall (Respondents) (*Endorsed Settlement*)

3827-94-R: Thompson Products Employees' Association (Applicant) v. TRW Canada Limited Linkage & Suspension Division (Respondent) (*Withdrawn*)

4079-94-R: United Food & Commercial Workers International Local 175 (Applicant) v. Robert M. Heenan Sales Ltd. c.o.b. Canadian Tire (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3556-94-R: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. The Spectator, a division Southam Inc. (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

0837-94-R: Burns International Security Services Limited (Applicant) v. The United Steelworkers of America and the United Plant Guard Workers of America Local 1962 (Respondents) (*Granted*)

2420-94-R: Christian Labour Association of Canada (Applicant) v. Ontario Guard Services Inc. (Respondent) v. Canadian Union of Professional Security Guards (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3122-94-R: Carlos Pereira and others (Applicant) v. International Union of Bricklayers and Allied Craftsmen Local 2, Ontario (Respondent) v. Permar Construction Ltd. (Intervener) (*Withdrawn*)

3181-94-R: Sophie Russell (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Adath Catering Company (Intervener)

Unit: “all employees of Adath Catering Company, in North York, classified as Waiter, Waitress, Captain, Hostess and Bartender” (33 employees in unit) (*Dismissed*)

3354-94-R: Ken McDavid (Applicant) v. Brewery, General and Professional Workers' Union (Respondent) v. Flexmaster Canada Limited c.o.b. as Uni-Flex Hose (Intervener)

Unit: “all employees of Flexmaster Canada Limited c.o.b. as Uni-Flex Hose at Whitby, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff” (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

3450-94-R: Earl Bernard Doucet (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Local Union 1072 (Respondent) v. SHG Marketing Co, a division of Suzanne Enterprises (Intervener)

Unit: “all employees of Suzanne Enterprises Ltd. at Cambridge, Ontario, save and except foreman, persons above the rank of foreman, shipper, receiver, office and sales staff and students hired during the school vacation period” (1 employees in unit) (*Dismissed*)

3607-94-R: Lois Carson (Applicant) v. United Steelworkers of America, Local 7282 (Respondent) v. Mike Doyle's Gardner Motors Inc. (Intervener) (*Withdrawn*)

3663-94-R: Staff of Community Lifecare Inc. (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Community Lifecare Inc. (Intervener) (*Dismissed*)

3734-94-R: Huntington University Support Staff (Applicant) v. Ontario Public Service Employees Union Local 668 (Respondent) v. Huntington University (Intervener) (*Granted*)

3877-94-R: Ian J. Cameron (Applicant) v. Teamsters Local Union No. 419 (Respondent) (*Withdrawn*)

3896-94-R: Mr. Edward L. Leblanc (Applicant) v. United Steelworkers of America, Local 6600 (Respondent) v. Inco Limited (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

4441-93-M: United Steelworkers of America, Local 6946 (Applicant) v. Canadian Security Union, Ensign Security Services Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3821-94-U: Communications, Energy & Paperworkers Union of Canada, Local, 1497 (Applicant) v. MacMillan Bathurst Inc. (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3797-94-U: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Durable Equipment (1984) Limited, and 1103864 Ontario Ltd. (c.o.b. as Royal Food Equipment) (Respondent) (*Terminated*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0838-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. Falconwin Property Management (Respondent) (*Withdrawn*)

0740-94-U: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. Metropol Security Ltd. (Respondent) (*Withdrawn*)

1153-94-U: Emmanuel Abegunrin (Applicant) v. CUPE Local One, and Robert Fairley, and Michel Carriere, and Pauline Brown (Respondent) v. Toronto Electric Commissioners (Intervener) (*Dismissed*)

1492-94-U: Power Workers' Union, CUPE Local 1000 (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)

1573-94-U: Donna Glover et al (Applicant) v. United Food and Commercial Workers International Union, Locals 175 and 633 (Respondent) v. The Great Atlantic & Pacific Company of Canada, Limited (Intervener) (*Dismissed*)

2095-94-U: IWA-Canada, Local 1-2693, and Claude Marcoux, Charles Barette, Ron LaFleur, Joseph Tourigny, Claude Vallieres, Daniel Damboise and Adelard Potvin (Applicants) v. Goulard Lumber (1971) Limited, Mark Goulard and Romeo Goulard, (Respondents) (*Granted*)

2124-94-U; 2134-94-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Placer Dome Inc., LCL Contracting and Commonwealth Pacific Consultants Limited (Respondents); Labourers' International Union of North America, Local 491 (Applicant) v. LCL Contracting, Placer Dome Inc. and Commonwealth Pacific Consultants Limited (Respondents) (*Withdrawn*)

2155-94-U: Tom Michibata and the Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent) (*Withdrawn*)

2201-94-U: The Civic Institute of Professional Personnel (Applicant) v. The Corporation of the City of Ottawa (Respondent) (*Terminated*)

2317-94-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a Division of Royplast Limited, Minh Tran (Respondents) (*Withdrawn*)

2572-94-U: Dragic Nikolic (Applicant) v. International Union of Bricklayers and Allied Craftsmen Local 6 Windsor (Respondent) (*Withdrawn*)

2574-94-U: International Brotherhood of Electrical Workers Local Union 1230 (Applicant) v. MacQuilly Inc. o/a Victoria Manor Ltd. (Respondent) v. Service Employees Union, Local 210 (Intervener) (*Withdrawn*)

2616-94-U: Labourers' International Union of North America, Local 183 (Applicant) v. Unit Park (Respondent) (*Dismissed*)

2825-94-U: Ivan Cvcek (Applicant) v. Schneider Employees Association (Respondent) v. J.M. Schneider Inc. (Intervener) (*Granted*)

2879-94-U; 3520-94-U: Service Employees' Union, Local 210 (Applicant) v. Provincial Nursing Home Limited Partnership c.o.b. as Seaforth Manor (Respondent) (*Withdrawn*)

2889-94-U: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Marcel Dubosq, Peter Gayton, Gert Rapp, Larry Wagler and Jack Viveen (Applicant) v. Teal Industrial Contractors Inc. (Respondent) (*Withdrawn*)

2954-94-U: Carpenters' Local 1256, Sarnia (Applicant) v. The Carpenters Bargaining Conference of the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 446, United Brotherhood of Carpenters & Joiners of America, Local 18, United Brotherhood of Carpenters & Joiners of America, Local Union 494, Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America, United Brotherhood of Carpenters and Joiners of America, Local Union 27 - Resilient Floor Workers, United Brotherhood of Carpenters & Joiners of America, Local 785, United Brotherhood of Carpenters and Joiners of America, Local 93, United Brotherhood of Carpenters & Joiners of America, Local 249, United Brotherhood of Carpenters and Joiners of America, Local Union 1316, United Brotherhood of Carpenters & Joiners of America, Local 1669, United Brotherhood of Carpenters and Joiners of America, Local 1946, United Brotherhood of Carpenters and Joiners of America, Local 1988, United Brotherhood of Carpenters and Joiners of America, Local 2041, United Brotherhood of Carpenters and Joiners of America, Local 2050, United Brotherhood of Carpenters and Joiners of America, Local 2222, United Brotherhood of Carpenters and Joiners of America, Local 2451, United Brotherhood of Carpenters and Joiners of America, Local 2486, United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Interveners) (*Withdrawn*)

2988-94-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Frade's Fruit Ltd. (Respondent) (*Granted*)

3032-94-U; 3033-94-U: United Steelworkers of America (Applicant) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Respondent) (*Endorsed Settlement*)

3082-94-U: Ed Caulfield (Applicant) v. Amalgamated Clothing & Textile Workers Union, Local 14J, Al Trewin, Steve Wodz, Pat Sullivan (Respondents) (*Withdrawn*)

3089-94-U: Barry Fitzgerald (Applicant) v. United Steelworkers of America, Local 8341 (Respondent) v. Arvin Automotive of Canada Ltd. (Intervener) (*Withdrawn*)

3091-94-U: Ontario Public Service Employees Union (Applicant) v. Homeward Family Shelter (Respondent) (*Withdrawn*)

3233-94-U: Amalgamated Clothing and Textile Workers' Union, AFL-CIO, CLC (Applicant) v. Z-Lite-Jenamees (Respondent) (*Granted*)

- 3237-94-U:** Darlene Jackson (Applicant) v. C.U.P.E. Local 1263 (Respondent) (*Withdrawn*)
- 3294-94-U:** The Amalgamated Transit Union, Local 1703 (Applicant) v. McDonnell-Ronald Limousine Service Limited c.o.b. as Airline Limousine (Respondent) (*Terminated*)
- 3316-94-U:** Barbara Tregunna (Applicant) v. Service Employees International Union (Respondent) v. Louise Marshall Hospital (Intervener) (*Withdrawn*)
- 3323-94-U; 3568-94-U:** Service Employees International Union (Applicant) v. Kleenway Building Maintenance Services Inc. (Respondent); Service Employees International Union, Local 183 (Applicant) v. Kleenway Building Maintenance Services Inc. (Respondent) (*Terminated*)
- 3348-94-U:** Ellen O. Williams and Rosalia DeSantis (Applicants) v. Office and Professional Employees International Union Local 491 - Canada (Respondent) (*Withdrawn*)
- 3355-94-U:** Arthur Brown (Applicant) v. Ontario Public Service Employees Union, Local 597 and The Reena Foundation (Respondents) (*Withdrawn*)
- 3384-94-U:** The Canadian Union of Public Employees and its Local 3741 (Applicant) v. Victorian Order of Nurses, Windsor-Essex Branch (Respondent) (*Withdrawn*)
- 3405-94-U:** Ontario Public Service Employees Union (Applicant) v. The Muki-Baum Association for the Rehabilitation of Multi-Handicapped Inc. (Respondent) (*Withdrawn*)
- 3458-94-U:** International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 141 (Applicant) v. Greenline Resins Incorporated (Respondent) (*Withdrawn*)
- 3483-94-U:** Jerry Jerrard (Applicant) v. Amalgamated Clothing and Textiles Workers Union (ACTWU), Wayne McGinnis, President of Union at Fleetwood Canada (Respondents) (*Withdrawn*)
- 3533-94-U:** Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local #20 of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. N.R.J.M. General Contractors Limited, 1000148 Ontario Inc. (Respondents) (*Endorsed Settlement*)
- 3566-94-U:** United Brotherhood of Carpenters and Joiners of America Local 1030 (Applicant) v. Tembec Forest Products (Respondent) v. The IWA-Canada, Local 1-1000 (Intervener) (*Withdrawn*)
- 3601-94-U:** Hospitality & Service Trades Union, Local 261 (Applicant) v. F.J.S. Holdings (c.o.b. as My Cousin's Restaurant) (Respondent) (*Withdrawn*)
- 3602-94-U:** Felicia Donkor (Applicant) v. Al Turner (Respondent) (*Withdrawn*)
- 3610-94-U:** Derek Wilson (Applicant) v. Canadian Union of Public Employees, Local 2221 (Respondent) v. COSTI (Intervener) (*Withdrawn*)
- 3644-94-U:** Bob Graham (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local Union 1688, 366838 Ontario Ltd. c.o.b. as City Wide Taxi (Respondents) (*Withdrawn*)
- 3655-94-U:** John Fonte (Applicant) v. Local 3219 of Brotherhood of Carpenters and Joiners of North America (Respondent) v. North York Board of Education (Intervener) (*Withdrawn*)
- 3714-94-U:** Ontario Public Service Employees Union (Applicant) v. Community Living Association for South Simcoe (Respondent) (*Withdrawn*)
- 3726-94-U:** Canadian Union of Operating Engineers and General Workers (Applicant) v. 519807 Ontario Ltd. c.o.b. as Howard Bus Service Ltd. (Respondent) (*Dismissed*)

3737-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. New Edinburgh Square Inc. (Respondent) (*Withdrawn*)

3747-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent) (*Withdrawn*)

3755-94-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Albis Canada Inc. (Respondent) (*Withdrawn*)

3764-94-U: United Steelworkers of America (Applicant) v. Dominion Castings Limited (Respondent) (*Withdrawn*)

3781-94-U: Dennis Bullen (Applicant) v. Danilo Buttazzoni, Robert Watson, Ron Smith, Tom Carr, Lou Candotta, International Union of Bricklayers and Allied Craftsmen Local 2 (Respondent) (*Dismissed*)

3793-94-U: Lawrence Chen, Stanley Chu, Lawrence Chum, Ka Yu Lau, Paul Lee, Quang Sinh Tang, Cheong Shing Yam (Applicant) v. CAW, Local 124 (Respondent) (*Withdrawn*)

3801-94-U; 3802-94-U: Bernie Belair (Applicant) v. Robert Barron (Respondent); Paul Boileau (Applicant) v. Robert Barron (Respondent) (*Withdrawn*)

3806-94-U: Antonio Campo (Applicant) v. Blue Line Taxi (Respondent) (*Dismissed*)

3820-94-U: Albert Zippoli (Applicant) v. Wilson's Truck Lines Ltd. (Respondent) (*Dismissed*)

3843-94-U: Hershey Canada Inc. (Lifesavers Plant) (Applicant) v. United Food and Commercial Workers International Union, AFL, CIO, CLC, UFCW Local 617P, Richard Pollock, Rose Maracle, Paul Doucette (Respondents) (*Withdrawn*)

3858-94-U: Canadian Union of Public Employees and its Local 1600 (Applicant) v. Board of Management of the Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

3879-94-U: Henry Jackson (Applicant) v. Tru-Wall Group Limited (Respondent) (*Dismissed*)

3882-94-U; 4146-94-U: United Steelworkers of America (Applicant) v. Lacey's Taxi Ltd. (Respondent) (*Withdrawn*)

3903-94-U: Daniel Slaney (Applicant) v. Canadian Security Union (Respondent) (*Dismissed*)

3925-94-U: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Tramin Limited (Respondent) (*Endorsed Settlement*)

3940-94-U: Paul Gutzke (Applicant) v. Kevin Pendergast (Skilled Trades Rep.) (Respondent) (*Dismissed*)

3949-94-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Maple Lodge Farms Ltd. (Respondent) (*Withdrawn*)

3956-94-U: Jules Jobidon (Applicant) v. International Painters & Allied Trades Local 1904 (Respondent) (*Dismissed*)

3961-94-U: Winnifred A. McKinley (Applicant) v. Dave Sitaram (Respondent) (*Withdrawn*)

3968-94-U: Teamsters Local Union No. 419 (Applicant) v. Supply Chain Management (Respondent) (*Endorsed Settlement*)

3969-94-U: S. Gagliardi (Applicant) v. City of Toronto Management (Respondent) (*Dismissed*)

3972-94-U: Jean Woods (Applicant) v. Dept. of Parks, Recreation and Culture City of Scarborough (Respondent) (*Dismissed*)

3989-94-U: Melvin Walsh, Walter Hluchyj (Applicants) v. Retail Wholesale Canada (Div. of U.S.W.A.) (Respondent) (*Dismissed*)

4126-94-U: Laverna M. Downey (Applicant) v. Stanley Bostitch (Respondent) (*Dismissed*)

4140-94-U: Christa Hume (Applicant) v. Service Employees International Union and Grace-Villa Nursing Home (Respondents) (*Dismissed*)

4147-94-U: Danny J. Courtney (Applicant) v. C.E.P. Communications, Energy and Paperworkers Union of Canada (Respondent) (*Dismissed*)

4148-94-U: IWA - Canada (Applicant) v. Dynamic & Proto Circuits Inc. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

3746-94-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent) (*Withdrawn*)

3808-94-M: IWA - Canada (Applicant) v. Dynamic & Proto Circuits Inc. (Respondent) (*Endorsed Settlement*)

4067-94-M: London and District Service Workers' Union, Local 220 (Applicant) v. Kettle Creek Gardens (Retirement Home) A Division of 904122 Ontario Ltd. (Respondent) (*Endorsed Settlement*)

4096-94-M: Service Employees International Union, Local 204 (Applicant) v. Movel Restaurants Limited (Respondent) (*Granted*)

4134-94-M: John Demetriades (Applicant) v. St. Joseph's Health Centre (Respondent) (*Dismissed*)

JURISDICTIONAL DISPUTES

3178-94-JD: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Nicholls-Radtke Ltd., The State Group Limited, The Jackson-Lewis Company Inc., New Generation Drywall Ltd., Ontario Sheet Metal Workers and Roofers Conference, Sheet Metal Workers International Association, Local 537 (Respondents) (*Granted*)

3567-94-JD: United Brotherhood of Carpenters and Joiners of America Local 1030 (Applicant) v. IWA-Canada, Local 1-1000 and Tembec Forest Products (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1042-94-OH: Ron Larose (Applicant) v. Gord Pearce, General Foreman, Copper Cliff Smelter, Inco Limited (Respondents) (*Withdrawn*)

3189-94-OH: Stacey J Boothby (Applicant) v. Carson Lake Lumber Ltd. (Respondent) (*Withdrawn*)

3476-94-OH: Vasilios Tsakaloglou P. Eng. (Applicant) v. Metal Koting Continuous Colour Coat Ltd. (Respondent) (*Withdrawn*)

3691-94-OH: Ronald J. Austin (Applicant) v. Giffin Sheet Metals Limited (Respondent) (*Withdrawn*)

3782-94-OH: Wayne LaPorte (Applicant) v. Rose Bowl Lanes (David Rose) (Respondent) (*Withdrawn*)

3898-94-OH: Elizabeth Blythe (Applicant) v. Alpa Lumber Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1989-91-G: United Brotherhood of Carpenters and Joiners of America Local Union 785 (Applicant) v. Robertson Yates Corporation Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (*Dismissed*)

3944-93-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Granted*)

1570-94-G; 2622-94-G: International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. M & I Aluminum Ltd., S D G Aluminum (Respondents); International Brotherhood of Painters' and Allied Trades, Local 1819 (Applicant) v. M & I Aluminum Ltd., Sam Dambrosio c.o.b. as S D G Aluminum (Respondents) (*Granted*)

1745-94-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Belmont Drywall & Acoustics Ltd. (Respondent) (*Endorsed Settlement*)

1759-94-G: International Union of Bricklayers and Allied Craftsmen Local 4, Ontario (Applicant) v. Regional Masonry (Respondent) (*Withdrawn*)

1922-94-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association ("EPSCA") (Respondents) (*Withdrawn*)

2082-94-G: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. North West Diesel Power Ltd. (Respondent) (*Granted*)

2088-94-G: Labourers' International Union of North America, Local 247 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

2253-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mid-View Construction & Drains Limited (Respondent) (*Granted*)

3066-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Filipuzzi Masonry Ltd. (Respondent) (*Endorsed Settlement*)

3102-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Interior Dimensions (Respondent) (*Withdrawn*)

3397-94-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada, Inc. (Respondent) (*Granted*)

3411-94-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Blenkhorn-Sayers (Respondent) (*Withdrawn*)

3427-94-G; 3428-94-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. 452918 Ontario Ltd. operating as Agincourt Drywall and Agincourt Drywall Limited and 740783 Ontario Inc. operating as Whitby Drywall (Respondents) (*Endorsed Settlement*)

3491-94-G; 3492-94-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Les Toitures Raymond Inc. (Respondent) (*Endorsed Settlement*)

3510-94-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Dante Masonry Ltd. (Respondent) (*Endorsed Settlement*)

3609-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Skyline Structural Forming Limited, Royal Forming (Respondents) (*Endorsed Settlement*)

3669-94-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Superior Glasswork (Respondent) (*Endorsed Settlement*)

3670-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Interprovincial Masonry Co. Ltd. (Respondent) (*Withdrawn*)

3671-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. George and Asmusen Limited (Respondent) (*Endorsed Settlement*)

3672-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. I.C.I. Masonry Corp. (Respondent) (*Withdrawn*)

3674-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. De Marinis (DMA) Incorporated (Respondent) (*Withdrawn*)

3675-94-G: International Union of Bricklayers and Allied Craftsmen-Local 7 - Canada (Applicant) v. Joe Arban Contractor Ltd. (Respondent) (*Endorsed Settlement*)

3677-94-G: International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Q Tech Limited (George T. Watson) (Respondent) (*Endorsed Settlement*)

3682-94-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Doug Wright Construction Ltd. (Respondent) (*Granted*)

3684-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pierre Gagne Contracting Ltd. (Respondent) (*Endorsed Settlement*)

3692-94-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Montgomery Kone Elevator Co. Limited (Respondent) (*Withdrawn*)

3700-94-G; 3709-94-G; 3711-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric Limited (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Plus Electrical Services Inc. (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Centennial Electric Limited (Respondent) (*Withdrawn*)

3703-94-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Canadian Stebbins Engineering & Mfg. (Respondent) (*Withdrawn*)

3750-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Towne Concrete Forming Ltd. (Respondent) (*Endorsed Settlement*)

3754-94-G: Labourers' International Union of North America, Local 607 (Applicant) v. Di-Tech Wire Sawing Systems Inc. (Respondent) (*Endorsed Settlement*)

3788-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Chen's Brothers Masonry and Construction Company (Respondent) (*Withdrawn*)

3804-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Royal Forming (1994) Limited (Respondent) (*Endorsed Settlement*)

3851-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Eagle Bricklayer Construction Ltd. (Respondent) (*Withdrawn*)

3852-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Benater Masonry Company Limited (Respondent) (*Withdrawn*)

3853-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Emco Masonry Limited (Respondent) (*Withdrawn*)

3854-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Keele Finch Masonry Limited/Eldorado Masonry Limited (Respondent) (*Withdrawn*)

3855-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Medi Group Masonry Limited/B & M Masonry Company (Respondent) (*Withdrawn*)

3856-94-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Westway Masonry Ltd. (Respondent) (*Withdrawn*)

3862-94-G; 3874-94-G; 3875-94-G: International Union of Bricklayers and Allied Craftsmen, Local 31, Ontario (Applicant) v. Calligaro Tile Co. Ltd. (Respondent) v. The Terrazzo, Tile & Marble Guild of Ontario Inc. (Intervener); International Union of Bricklayers and Allied Craftsmen, Local 31, Ontario (Applicant) v. 685577 Ontario Ltd. - Castlewall, Castlewall Developments Ltd., and Affiliates (Respondent) v. The Terrazzo, Tile & Marble Guild of Ontario Inc. (Intervener); International Union of Bricklayers and Allied Craftsmen, Local 31, Ontario (Applicant) v. Amber Tile & Terrazzo Inc. (Respondent) v. The Terrazzo, Tile & Marble Guild of Ontario Inc. (Intervener) (*Endorsed Settlement*)

3867-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Andre Gauvreau Insulation (Respondent) (*Withdrawn*)

3919-94-G: International Brotherhood of Painters and Allied Trades, and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Rovico Architectural Products (Respondent) (*Endorsed Settlement*)

3947-94-G: International Brotherhood of Painters and Allied Trades, Glaziers and Glassworkers - Local 1819 (Applicant) v. The Window Place Incorporated (Respondent) (*Withdrawn*)

3954-94-G: International Brotherhood of Painters and Allied Trades, and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Glaziers Local 1819 (Applicant) v. Castle Craft Corporation (Respondent) (*Endorsed Settlement*)

3988-94-G: International Brotherhood of Painters and Allied Trades (Applicant) v. The Corporation of the City of Toronto (Respondent) (*Withdrawn*)

4048-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. York Concrete Forming (Respondent) (*Endorsed Settlement*)

4050-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Domti Construction Company Limited (Respondent) (*Withdrawn*)

4052-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Choiceland Contracting Ltd. (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3216-91-U: Giancarlo (John) Cesaroni (Applicant) v. Sean O'Ryan and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Respondent) (*Denied*)

0806-94-R: Harold Swimm (Applicant) v. Retail, Wholesale and Department Store Union (Respondent) v. Northern Uniform Service Corp. (Intervener) (*Denied*)

0883-94-R: Teamsters Local Union No. 879 (Applicant) v. G.S. Dunn & Co. Limited (Respondent) (*Denied*)

1713-94-U: Darryl B. Norman (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. 971087 Ontario Inc. o/a Trimplas 2000 (Intervener) (*Denied*)

2428-94-R: Ontario Secondary School Teachers' Federation (Applicant) v. Ottawa Board of Education (Respondent) (*Dismissed*)

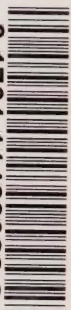
2573-94-U: William J. Viven (Applicant) v. United Steelworkers of America Local 7135 (Respondent) v. National Steel Car Limited (Intervener) (*Denied*)

2941-94-R: Solid Wood Research Employees Association (Applicant) v. Solid Wood Research Inc. (Respondent) v. IWA Canada Local 2693 (Intervener) (*Denied*)

3447-94-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Meaford General Hospital (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778



3 1761 11468022 6